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SEX DISCRIMINATION BY LAW: A STUDY IN JUDICIAL PERSPECTIVE

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CHARLES L. KNAPP*

In this article, the authors analyze a wide variety of cases in which the courts have dealt with sex discrimination by law and conclude that the performance of American judges in this area has generally ranged from "poor to abominable." Arguing that many of the considerations which have led to the invalidation of racially discriminatory laws are equally present when legislative classifications are based on sex, they suggest that the general failure of the courts to perceive this point may be due to certain deeply ingrained attitudes that judges share with a majority of American males. The authors therefore conclude by proposing several counter-measures which judges may employ to overcome any male bias and bring a more objective outlook to the resolution of sex discrimination issues.

I

INTRODUCTION

WOMEN'S liberation is: a slogan—a challenge—a movement—a threat—a cliché—an enigma—or something else, depending on who you are. It is not surprising that "women's lib" connotes different things to different people; their perceptions of it reflect differing social and cultural backgrounds and varying levels of sensitivity to the disadvantages inflicted on some members of society solely for being female. It follows that any contribution (pro or con) to the growing body of "women's lib" literature is likely to be disparaged by some readers as the product of an uninformed mind or a distorted sense of values. It can thus be easily dismissed, on the ground of fatal bias—intentional, subconscious, or naive—by anyone who has strong opposing feelings on the subject.

Though mindful of these pitfalls, we nevertheless tender our own analysis of judicial attitudes toward the relationship between the sexes, gleaned from opinions in cases involving sex-based discrimination. We do not claim to be particularly, much less uniquely, qualified to comment on such matters. Each of us is a middle-aged, white male—some might characterize us as fairly typical WASPs, of the subspecies "law professor." Neither

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of us has ever been radicalized, brutalized, politicized or otherwise leaned on by the Establishment in any of the ways that in recent years have led many to adopt heretical views of various kinds.

Each of us, however, was led last year—one through bar association activity,¹ the other in response to questions from female students about the property rights of women—to begin to investigate the ways in which American judges have responded to various types of sex discrimination.² Our research has been of the most traditional kind: finding, analyzing, attacking and defending judicial opinions. We believe that our selection of cases is representative, though admittedly far from exhaustive.

Our conclusion, independently reached, but completely shared, is that by and large the performance of American judges in the area of sex discrimination can be succinctly described as ranging from poor to abominable. With some notable exceptions, they have failed to bring to sex discrimination cases those judicial virtues of detachment, reflection and critical analysis which have served them so well with respect to other sensitive social issues. Particularly striking, we believe, is the contrast between judicial attitudes toward sex and race discrimination. Judges have largely freed themselves from patterns of thought that can be stigmatized as "racist"—at least their opinions in that area exhibit a conscious attempt to free themselves from habits of stereotypical thought with regard to discrimination based on *color*. With respect to *sex* discrimination, however, the story is different. "Sexism"—the making of unjustified (or at least unsupported) assumptions about individual capabilities, interests, goals and social roles solely on the basis of sex differences—is as easily discernible in contemporary judicial opinions as racism ever was.

We will attempt to demonstrate this thesis through a sampling of what American judges have said in opinions in sex discrimination cases over the past hundred years. Some opinions contain assertions that are, by any rational analysis, overt dec-

¹ Professor Knapp was a member of the Committee on Federal Legislation of the Association of the Bar of the City of New York, which studied proposed constitutional amendments designed to redress discrimination on the basis of sex. The committee's findings appear in Report, Amending the Constitution to Prohibit State Discrimination Based on Sex, 26 Record of N.Y.C.B.A. 77 (1971).

² "Sex discrimination" can be used in a generic sense, connoting differing treatment of individuals solely on the basis of their sex. It can also be used in a pejorative sense to denote those situations in which inequality of treatment is designed to benefit one sex to the detriment of the other. Except where the context indicates otherwise, we will use the term in the former sense.

larations of "male supremacy." In others, more or less objective rationales for sex discrimination are advanced. The relatively few (and for the most part quite recent) decisions invalidating sex discrimination will also receive consideration, substantively and as possible precursors of a changing judicial attitude.

We make no particular claim for the originality of any of the ideas expressed in the discussion that follows. Indeed, it seems to us that most of them have probably been expressed already by others, although sometimes in a different form or context.³ We have, however, attempted to compile, from judicial opinions in several major areas of sex discrimination by law, those arguments and statements that most clearly reveal the attitudes shaping judicial decisions. We will avoid protracted discussion of particular questions of constitutional doctrine, such as the precise interpretation and application of the due process and equal protection clauses; we also prefer not to join the increasingly heated debate over the desirability of a new "Equal Rights" amendment.⁴ We have avoided emphasizing these issues in part because of our lack of constitutional expertise, but also because we are convinced that preoccupation with legal doctrine has left largely unexplored the surprising extent to which the survival of sex discrimination can be attributed to pervasive judicial attitudes.

We have investigated a number of areas in which the states discriminate by law on the basis of sex. Taken individually, some may appear of less than overwhelming importance; in the aggregate, however, they encompass a broad spectrum of activity, affecting women in several significant aspects of their relationship to society.⁵

³ Some of the most valuable references are: L. Kanowitz, *Women and the Law* (1969); Crozier, *Constitutionality of Discrimination Based on Sex*, 15 B.U.L. Rev. 723 (1935); Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 Geo. Wash. L. Rev. 232 (1965); Note, *Sex Discrimination and Equal Protection: Do We Need A Constitutional Amendment?*, 84 Harv. L. Rev. 1499 (1971); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109 (1971); Note, *Sex Discrimination and the Constitution*, 2 Stan. L. Rev. 691 (1950). Also of interest is Brown, Emerson, Falk and Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871 (1971), which appeared as this article was going to press.

⁴ For a recent exchange of views on the subject by eminent constitutional lawyers, see Symposium, *Equal Rights for Women: A Symposium on the Proposed Constitutional Amendment*, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 215 (1971). See also Brown, Emerson, Falk and Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, *supra* note 3.

⁵ A March 1970 memorandum of the Citizens' Advisory Council on the Status of Women lists 15 specific areas of sex discrimination:

II

SEX DISCRIMINATION BY LAW

A. *Professional and Occupational Restrictions*1. *Practice of Law*

One of the earliest Supreme Court decisions upholding sex discrimination by state action was *Bradwell v. Illinois*.⁶ In that case the Illinois Supreme Court had denied a woman's application for a license to practice law solely because she was a female. Although the state statute delegating to the court authority over bar admissions made no specific provision for the exclusion of females, the state court found this to have been the legislative intent and denied the application. It assumed that at the time the statute was enacted the legislators held certain fixed ideas about the roles of the sexes: "That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws was regarded as an almost axiomatic truth."⁷

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1. State laws placing special restrictions on women with respect to hours of work and weightlifting on the job;
 2. State laws prohibiting women from working in certain occupations;
 3. Laws or practices operating to exclude women from State colleges and universities (including higher standards required for women applicants to institutions of higher learning and in the administration of scholarship programs);
 4. Discrimination in employment by State and local governments;
 5. Dual pay schedules for men and women public school teachers;
 6. State laws providing for alimony to be awarded, under certain circumstances, to ex-wives but not to ex-husbands;
 7. State laws placing special restrictions on the legal capacity of married women or on their right to establish a legal domicile;
 8. State laws that require married women but not married men to go through a formal procedure and obtain court approval before they may engage in an independent business;
 9. Social Security and other social benefits legislation which give greater benefits to one sex than to the other;
 10. Discriminatory preferences, based on sex, in child custody cases;
 11. State laws providing that the *father* is the natural guardian of the minor children;
 12. Different ages for males and females in (a) child labor laws, (b) age for marriage, (c) cutoff of the right to parental support, and (d) juvenile court jurisdiction;
 13. Exclusion of women from the requirements of the Military Selective Service Act of 1967;
 14. Special sex-based exemptions for women in selection of State juries;
 15. Heavier criminal penalties for female offenders than for male offenders committing the same crime.

116 Cong. Rec. E2588 (daily ed. Mar. 26, 1970). We shall treat in some detail the first three and the last two items on this list. In addition, we will discuss discrimination in places of public accommodation and with respect to recovery for loss of consortium.

⁶ 83 U.S. (16 Wall.) 130 (1873).

⁷ *Id.* at 132.

The petitioner appealed this ruling to the Supreme Court on constitutional grounds. There was no opposing counsel, but none was needed since only Chief Justice Chase dissented from the decision affirming the denial of the application.

The opinion of the court was mainly addressed to the petitioner's claim that the state court's action violated the privileges and immunities clause of the fourteenth amendment. This claim was rejected on the ground that the petitioner, having become a citizen of Illinois, could no longer claim the protection of that clause. The court further indicated that, in any event, admission to law practice was not one of the privileges or immunities of a citizen of the United States.

The opinion did not expressly refer to equal protection. This may be attributable to the fact that, in the *Slaughterhouse Cases*⁸ decision handed down just prior to *Bradwell*, the Court had expressly limited the scope of fourteenth amendment equal protection to cases involving racial discrimination.⁹

The most interesting feature of the case, however, is the concurring opinion of Mr. Justice Bradley, in which two of his brethren joined. As an affirmation of God's grand design for the sexes, we believe it is unexcelled in legal literature. The significant passages are the following:

The claim that, under the fourteenth amendment of the Constitution, which declares that no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, the statute law of Illinois, or the common law prevailing in that State, can no longer be set up as a barrier against the right of females to pursue any lawful employment for a livelihood (the practice of law included), assumes that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life.

It certainly cannot be affirmed, as an historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The

⁸ 83 U.S. (16 Wall.) 36 (1873).

⁹ We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this [equal protection] provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.

Id. at 81.

constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. One of these is, that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor.

It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

The humane movements of modern society, which have for their object the multiplication of avenues for woman's advancement, and of occupations adapted to her condition and sex, have my heartiest concurrence. But I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities. In the nature of things it is not every citizen of every age, sex and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State; and, in my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.¹⁰

Unfortunately, the reader is not favored with any indication of the manner by which this "divine ordinance" was transmitted by the Creator to Mr. Justice Bradley.

¹⁰ 83 U.S. (16 Wall.) at 140-42.

Twenty-one years after *Bradwell*, the Supreme Court affirmed another state's denial of a woman's application for admission to law practice. In *In re Lockwood*,¹¹ the petitioner had already been admitted to the bars of the Supreme Court and the District of Columbia (and allegedly of several other states as well). A Virginia statute provided that any "person" who had been previously admitted to practice in any state or in the District of Columbia could also practice in Virginia's courts. The Supreme Court of Appeals of Virginia simply construed "person" to mean "male" and denied the petition. The primary issue for the Supreme Court was the state court's interpretation of the statute. In a short opinion for a unanimous Court, Chief Justice Fuller refused to issue a writ of mandamus ordering petitioner's admission to practice. As in *Bradwell*, there was no mention of equal protection; and, of course, *Bradwell* had already foreclosed the privileges and immunities argument.

The Supreme Court has not decided any other cases involving exclusion of women from the practice of law. It is quite clear by now, of course, that the equal protection clause does apply to state regulation of bar admissions and that a denial of admission on grounds having no "rational connection with the applicant's fitness or capacity to practice law" is invalid.¹² By the time these principles became clearly recognized, however, total exclusion of women from law practice was no longer an active problem. Thus, *Bradwell* and *Lockwood* remain the only Supreme Court decisions on the subject.

It is inconceivable, were the issue to arise, that any court today would conclude that there is a rational basis for the total exclusion of women from law practice. In this area, God's grand design has thus been overtaken by the demonstrated fact that women are not, as a class, inherently unfit to practice law.¹³ As

¹¹ 154 U.S. 116 (1894).

¹² See *Konigsberg v. State Bar*, 353 U.S. 252, 262 (1957); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957).

¹³ In 1949, then U.S. Supreme Court Associate Justice Thomas C. Clark described women lawyers in the following words:

As lawyers they have demonstrated their ability in all phases of law. . . . Any debate as to their legal ability would be as obsolete as a discussion on the merits of Woman Suffrage. . . . [Y]ou can depend upon a woman lawyer for a careful painstaking legal job. . . . The legal profession has been immeasurably strengthened by the presence of women lawyers.

Tally, *Women Lawyers of Yesterday, Today, and Tomorrow*, 46 *Women Lawyers J.*, Summer, 1960, at 21, 23-24.

Women have proved themselves to be capable practitioners and have risen to important positions within the legal profession:

According to the United States Department of Labor, about 175 women were judges of Federal, State, County, and City courts in 1955

we shall see, however, the attitudes revealed by Justice Bradley have been widely shared by American judges and have decisively influenced their response whenever the validity of sex discrimination has been called into question.

2. *Sale of liquor*

The states undoubtedly possess broad powers over the sale of intoxicating beverages.¹⁴ State regulation has frequently included restrictions on the issuance of bartending licenses to women unless they are closely related to the male owner of a licensed establishment. A Michigan statute prohibiting the issuance of a bartending license to a female, unless the wife or

This figure does not include women justices of the peace. In 1957 a woman was presiding judge of the Sixth Circuit . . . of the United States Court of Appeals, the highest judicial post ever held by a woman in the United States. Another woman was judge of the United States District Court, one of the fifteen judges for the District of Columbia. In California, a woman was, as of 1957, an associate Justice of the Tax Court of the United States and a woman was appointed a judge of the United States Customs Court in June, 1955, the second woman to hold this post

Harris, *Women and the Law*, 47 *Women Lawyers J.*, Winter, 1961, at 20, 21. Furthermore, the number of women sitting as judges has now risen to 200 and the number of female federal district judges has increased to three. There is still only one woman on the United States courts of appeals. Sassower, *Women in the Law: The Second Hundred Years*, 57 *A.B.A.J.* 329, 330-31 (1971). Nevertheless, the legal profession remains male dominated; women lawyers constitute only about 3% of the total. Moreover, this percentage has remained virtually constant over the past 20 years. The percentage from 1948 to 1966 rose only from 1.8 to 2.8%. The 1967 *Lawyer Statistical Report* 15 (Weil ed. 1968).

After admission to the bar, women encounter further discrimination. In a study of women lawyers, James J. White found on the basis of a questionnaire study that "males make a lot more money than do the females." White, *Women in the Law*, 65 *Mich. L. Rev.* 1051, 1057 (1967). Furthermore, the practices of women lawyers seem to be centered around certain areas: "The proportion of females engaged in trusts and estates (60%), domestic relations (50%) and tax (31%) [was] higher than the proportion of men engaged in these activities. These data accord with the commonly held beliefs about women's practice." *Id.* at 1062. See generally Dinerman, *Sex Discrimination in the Legal Profession*, 55 *A.B.A.J.* 951 (1969); Sassower, *Women in the Law: The Second Hundred Years*, 57 *A.B.A.J.* 329 (1971); Testimony Submitted by the Women's Rights Comm. of N.Y.U. School of Law for Hearings Conducted by the House Subcomm. on Educ., 116 *Cong. Rec. H7980* (daily ed. Aug. 10, 1970).

¹⁴ The twenty-first amendment provides that "the transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2. This amendment has been interpreted as relaxing the usual commerce clause limitations on state regulation of the liquor trade. *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 330-31 (1964); *Carter v. Virginia*, 321 U.S. 131, 140 (1944) (Frankfurter, J., concurring); *Ziffirin, Inc. v. Reeves*, 308 U.S. 132, 137-38 (1939). The amendment does not, however, similarly relax the due process and equal protection guarantees of the fourteenth amendment. See *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966); *Parks v. Allen*, 409 F.2d 210 (5th Cir. 1969); *Krauss v. Sacramento Inn*, 314 F. Supp. 171, 177-78 n.5 (E.D. Cal. 1970).

daughter of an owner, was challenged on equal protection grounds in *Goesaert v. Cleary*.¹⁵

The principal defect complained of, however, was not the general exclusion of women from bartending but the *exception* made in favor of wives and daughters of owners. Appellant's contention was that this exception had no rational basis. The statute was nevertheless upheld by the court, voting six-to-three. Writing for the court, Mr. Justice Frankfurter declared:

Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic. See the Twenty-First Amendment and *Carter v. Virginia*, 321 U.S. 131. The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards.¹⁶

The majority obviously did not perceive any serious equal protection problems arising from a complete exclusion of women from bartending.¹⁷ But what *is* the rational basis for exclusion, in terms of fitness or capacity to be a bartender? The opinion contains only a vague reference to "moral and social problems" against which the state is permitted to protect itself. Nothing else.

Having concluded that total exclusion would be upheld, the majority then considered the validity of Michigan's exception:

Since bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures, the legislature need not go to the full length of prohibition if it believes that as to a defined group of females other factors are operating which either eliminate or reduce the moral and social problems otherwise calling for prohibition. Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such

¹⁵ 335 U.S. 464 (1948).

¹⁶ *Id.* at 465-66.

¹⁷ The three-judge district court from which the appeal had been taken was no more enlightening in its discussion of the legislative intent, referring to a conceivable (but unspecified) "grave social problem" that could be created by female bartenders and to the likelihood that male owners would be motivated to maintain a "wholesome atmosphere" if their wives or daughters were tending bar. The statute was then categorized as a "special provision for the protection of women." *Goesaert v. Cleary*, 74 F. Supp. 735, 739 (E.D. Mich. 1947).

protecting oversight. This Court is certainly not in a position to gainsay such belief by the Michigan legislature. If it is entertainable, as we think it is, Michigan has not violated its duty to afford equal protection of its laws. We cannot cross-examine either actually or argumentatively the mind of Michigan legislators nor question their motives. Since the line they have drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling.¹⁸

The three dissenters did not comment upon the majority's assertion that total exclusion of women from bartending would be valid. Instead, they dissented only because the exception operated in favor of female relatives of a male owner, but did not extend to daughters of a *female* owner—or, for that matter, to a female owner herself. This fact convinced them that the legislature was not actually motivated by "solicitude for the moral and physical well-being" of would-be female bartenders. Furthermore, they concluded that such solicitude would be the "only conceivable justification" for this type of discrimination. The opinion of the Court did not respond to the dissenters' argument.

Perhaps the most striking feature of the case, though, is the fact that in 1948 no member of the Court openly challenged the assertion that, in the interest of protecting itself against unspecified "social problems," a state could exclude all women from the occupation of bartending. The opinion displays only token adherence to the requirement that, in order for a legislative classification to be valid, there must be a rational connection between the classification and some proper legislative goal. Since this is usually the minimum requirement for upholding a state statute against an equal protection challenge, the Court clearly did not consider the statute to be class legislation in the area of protected civil liberties, to be sustained only if a compelling state interest in the classification is shown.¹⁹

Prior to *Goesaert*, a number of state courts had sustained similar statutes, brushing aside constitutional challenges with expressions of deference to legislative judgment in matters of

¹⁸ 335 U.S. at 466-67.

¹⁹ For a general discussion of the difference between the usual "reasonable classification" test of equal protection and the more strict "compelling state interest" test applied to certain "suspect" classifications, see Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065 (1969). For a recent illustration of the manner in which the determination of the applicable test may affect the result of a case, see *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971).

The Supreme Court has never held that sex discrimination is inherently suspect, nor has it ever invalidated such discrimination by applying the "reasonable classification" test. See note 206 *infra*.

"public morality."²⁰ A rare exception was the unanimous decision by the Supreme Court of Florida²¹ invalidating a statute which prohibited women from serving "liquor by the drink over any bar or counter." The short opinion is couched mainly in substantive due process terms, ignoring the array of contrary decisions in other states.

In cases decided after *Goesaert*, state courts have tended to rely heavily on that opinion in sustaining statutes against constitutional challenge.²² At least two state courts, however, have repudiated the reasoning of *Goesaert* and similar cases.

In *Paterson Tavern & Grill Owners Association, Inc. v. Borough of Hawthorne*,²³ the Supreme Court of New Jersey invalidated a local ordinance which excluded women from bartending. Noting that *Goesaert* had been the subject of critical academic comment, the court concluded that its precedential value was highly questionable. Having so concluded, however, the court nevertheless declined to invalidate the ordinance on equal protection grounds. Rather, it declared that the ordinance exceeded the borough's delegated police power, "in the light of current customs and mores,"²⁴ and the court thereby limited its holding to the specific regulation presented.²⁵ Thus, it appears that the New Jersey court will now seriously test any sex-based

²⁰ See, e.g., *City of Hoboken v. Goodman*, 68 N.J.L. 217, 51 A. 1092 (Sup. Ct. 1902): "The supposed evil aimed at is the employment of women in connection with a traffic likely to induce vice and immorality." *Id.* at 221, 51 A. at 1093. See also *State v. Considine*, 16 Wash. 358, 364, 47 P. 755, 757 (1897):

The legislature is the supreme authority, within constitutional limitations, to determine what is and what is not an immoral business or a nuisance, and when it has so determined, its enactment is valid unless the legislative act is clearly partial, arbitrary, and oppressive. The prohibition of employment of a female person in the statute under which defendant was convicted uniformly applies to all persons employing, and who are engaged in a like business with defendant, and extends to all female persons employed.

Fifty years later, the pattern remained the same. See, e.g., *Fitzpatrick v. Liquor Control Comm'n*, 316 Mich. 83, 105, 25 N.W.2d 118, 127 (1946): "The extent to which the legislature may be influenced by a newer conception . . . as to the rights of women in employment and in social life, and particularly to act as bartenders in licensed liquor establishments, is for the legislature, and it only, to decide."

²¹ *Brown v. Foley*, 158 Fla. 734, 29 So. 2d 870 (1947).

²² E.g., *Hargens v. Alcoholic Beverage Control Appeals Bd.*, 263 Cal. App. 2d 601, 69 Cal. Rptr. 868 (Ct. App. 1968); *State v. Burke*, 79 Idaho 205, 312 P.2d 806 (1957).

²³ 57 N.J. 180, 270 A.2d 628 (1970).

²⁴ *Id.* at 186, 270 A.2d at 631.

²⁵ A similar technique was employed by the New Jersey courts to invalidate an ordinance prohibiting women from being served liquor at a bar unless seated. *Gallagher v. City of Bayonne*, 106 N.J. Super. 401, 256 A.2d 61 (Super. Ct. App. Div.), *aff'd*, 55 N.J. 159, 259 A.2d 912 (1969). See text accompanying notes 89-90 *infra*.

discriminatory legislation to determine whether it has any rational basis; indeed, it might eventually be persuaded to employ an equal protection rationale in such cases.

In invalidating a California statute prohibiting female bartenders,²⁶ however, that state's supreme court refused to confine itself to such a limited rationale. Its unanimous decision in *Sail'er Inn, Inc. v. Kirby*²⁷ is the most far-reaching state court decision on the subject of sex discrimination, and seems destined for landmark status.

In *Sail'er Inn*, several bar owners who were employing female bartenders sought a writ of mandamus to prevent the state's alcoholic beverage control authority from revoking their liquor licenses in consequence of their violation of the statute. The court might have held that the statute had been impliedly repealed by a 1970 amendment to the California Fair Employment Practices Act expressly barring sex discrimination.²⁸ This would not have been a novel holding²⁹ and by itself would have furnished a sufficient ground for granting the requested relief. The court chose, however, to address itself to questions of greater import.

Initially, the court considered petitioners' contention that the state statute had been superseded, as a matter of federal supremacy, by Title VII of the 1964 Civil Rights Act.³⁰ Title VII prohibits any employer under its coverage³¹ from discriminating on the basis of sex except where a "bona fide occupational qualification" is concerned. In harmony with a growing body of authority,³² the court held that the state law was superseded by Title VII as to those petitioners whose employers were subject thereto, the state having failed to advance sufficient facts to justify excluding females from the occupation of bartending.

Furthermore, the court could have rested its decision solely

²⁶ This statute declared it a misdemeanor for a female to serve as a bartender and subjected both employer and employee to criminal sanctions. It also contained an exception for female owners of bars and wives of male owners. Cal. Bus. & Prof. Code § 25656 (West 1964).

²⁷ 485 P.2d 529, 95 Cal. Rptr. 329 (Sup. Ct. 1971).

²⁸ Cal. Labor Code §§ 1411-12 (West 1971).

²⁹ See, e.g., *Longacre v. State*, 448 P.2d 832 (Wyo. 1968).

³⁰ Civil Rights Act of 1964, §§ 701-16, 42 U.S.C. §§ 2000e-2000e-15 (1964). The effect of Title VII on state regulation of employment conditions is considered more fully in the next section.

³¹ Employers with fewer than 25 employees are exempt from Title VII. Id. § 701(b), 42 U.S.C. § 2000e(b) (1964). Apparently some, but not all, of the employers in *Sail'er Inn* were exempt on this ground. See 485 P.2d at 532 n.4, 95 Cal. Rptr. at 332 n.4.

³² See text accompanying notes 69-74 *infra*.

upon a provision of the California constitution which prohibits the disqualification of any person, on account of sex, "from entering or pursuing a lawful business, vocation, or profession."³³ An early precedent had construed the provision as follows:

As we understand the section, it does establish, as the permanent and settled rule and policy of this State, that *there shall be no legislation either directly or indirectly incapacitating or disabling a woman from entering on or pursuing any business, vocation, or profession* permitted by law to be entered on and pursued by those sometimes designated as the stronger sex. . . . [T]here are no exceptions in this section, and neither we nor any other power in the State have the right or authority to insert any, whether on the ground of immorality or any other ground. All these are considerations of policy, the determination of which belonged to the convention framing and the people adopting the Constitution; and their final and conclusive judgment has been expressed and entered in the clear and unmistakable language of the Constitution itself³⁴

The *Sail'er Inn* opinion accepted this view: "[A]lthough an inability to perform the tasks required by a particular occupation, sex-linked or not, may be a justification for discrimination against job applicants, under section 18, mere prejudice, however ancient, common or socially acceptable, is not."³⁵

Three arguments were presented to the *Sail'er Inn* court in support of the proposition that women are in some respects less able to perform the duties of a bartender. First, it was contended that women are incapable of preserving order and protecting patrons of a bar. The court answered:

This argument ignores modern day reality. Today most bars, unlike the saloons of the Old West, are relatively quiet, orderly and respectable places patronized by both men and women. Even if they were not, many bars employ bouncers whose sole job is to keep order in the establishment. Furthermore, the experience in the states which permit women to tend bar indicates that the dire moral and social problems predicted by the Attorney General do not arise.³⁶

Second, the statute was said to be a measure for protecting women against injury at the hands of inebriated customers. The court replied:

The desire to protect women from the general hazards inherent in many occupations cannot be a valid ground for excluding them from those occupations under section 18. Women must be per-

³³ Cal. Const. art. 20, § 18 (West 1954).

³⁴ *In re Maguire*, 57 Cal. 604, 608 (1881) (emphasis added).

³⁵ 485 P.2d at 533, 95 Cal. Rptr. at 333.

³⁶ *Id.* at 533-34, 95 Cal. Rptr. at 333-34.

mitted to take their chances along with men when they are otherwise qualified and capable of meeting the requirements of their employment. . . . We can no more justify denial of the means of earning a livelihood on such a basis than we could deny all women drivers' licenses to protect them from the risk of injury by drunk drivers. Such tender and chivalrous concern for the well-being of the female half of the adult population cannot be translated into legal restrictions on employment opportunities for women.³⁷

Finally, it was argued that the statute tends to prevent "improprieties and immoral acts." The court responded:

Section 18 in no way prevents the Legislature from dealing effectively with the evils and dangers inherent in selling and serving alcoholic beverages; it merely precludes resort to legislation against women rather than against the particular evil sought to be curbed.³⁸

Concluding that the statute was in conflict with the constitutional provision, the court declared it void.

This construction of the state constitutional provision relating to sex discrimination in business and employment furnished ample basis for granting the relief sought by the petitioners in *Sail'er Inn*; it was therefore unnecessary for the court even to consider the application of the equal protection clauses of the California and United States constitutions.³⁹ Nevertheless, the court did reach this question—and its discussion of equal protection is clearly the most significant part of the opinion.

The court properly recognized that the initial issue was which equal protection test to apply. Conceding that the Supreme Court had never expressly so held, the court nevertheless concluded that "fundamental interests" were affected and that the "strict scrutiny" test was therefore appropriate. The court perceived two reasons for applying this high standard to the statute: it infringed upon the "fundamental right to pursue a lawful profession," and it involved a sex classification, which "should be treated as suspect."⁴⁰ The court's discussion of the latter point is particularly apt and persuasive. After noting several cases in which the Supreme Court had applied this test to such classifications as race and national origin,⁴¹ the court then drew this analogy to sex classification:

³⁷ Id. at 534, 95 Cal. Rptr. at 334.

³⁸ Id.

³⁹ The court asserted that the clauses are substantially identical, citing *County of Los Angeles v. Southern Cal. Tel. Co.*, 32 Cal. 2d 378, 196 P.2d 773 (1948). 485 P.2d at 538 n.13, 95 Cal. Rptr. at 338 n.13.

⁴⁰ 485 P.2d at 539, 95 Cal. Rptr. at 339.

⁴¹ *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948); *Korematsu v. United States*, 323 U.S. 214 (1944); *Truax v. Raich*, 239 U.S. 33 (1915).

Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classification is that the characteristic frequently bears no relation to ability to perform or contribute to society. . . . The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members. . . . Where the relation between characteristic and evil to be prevented is so tenuous, courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious laws or practices.

Another characteristic which underlies all suspect classifications is the stigma of inferiority and second class citizenship associated with them. . . . Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities. Like black citizens, they were, for many years, denied the right to vote and, until recently, the right to serve on juries in many states. They are excluded from or discriminated against in employment and educational opportunities. Married women in particular have been treated as inferior persons in numerous laws relating to property and independent business ownership and the right to make contracts.

Laws which disable women from full participation in the political, business and economic arenas are often characterized as "protective" and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage. We conclude that the sexual classifications are properly treated as suspect, particularly when those classifications are made with respect to a fundamental interest such as employment.⁴²

The court then considered the state interests allegedly served by the statute. The state had argued that female bartenders might commit "improprieties" and that they would be an "unwholesome influence" on bar patrons. The first contention was rejected with these comments:

This rationale fails as a compelling state interest because it is wholly arbitrary and without support in logic or experience.

....

Where the evil which the Legislature seeks to prevent can be directly prevented through nondiscriminatory legislation, and where the class singled out by the Legislature has no necessary connection with the evil to be prevented, the statute must be struck down as an invidious discrimination against that class.⁴³

The second argument fared no better:

The claim of unwholesomeness is contradicted by statutes which permit women to work as cocktail waitresses, serve beer and wine

⁴² 485 P.2d at 540-41, 95 Cal. Rptr. at 340-41.

⁴³ Id. at 542, 95 Cal. Rptr. at 342.

from behind a bar (Bus. & Prof. Code, § 25655), or tend bar if they or their husbands hold a liquor license. The objection appears to be based upon notions of what is a "ladylike" or proper pursuit for a woman in our society rather than any ascertainable evil effects of permitting women to labor behind those "permanently affixed fixtures" known as bars. Such notions cannot justify discrimination against women in employment.⁴⁴

The court's conclusion was stated with devastating simplicity: "The state has not only failed to establish a compelling interest served by [the statute], but it has failed to establish any interest at all."⁴⁵ The statute was held to be violative of the equal protection clauses of the California and federal constitutions.

Sail'er Inn is a remarkable decision. Although a few other state and federal courts have invalidated various types of sex discrimination on constitutional grounds, this opinion is by far the most penetrating. The California court is the first state court of last resort to accept the thesis that sex is a "suspect" classification. The same conclusion has been reached by at least one lower federal court,⁴⁶ but *Sail'er Inn* appears at this time to be the most persuasive opinion addressed to the constitutional question. If other courts are moved to adopt this test of equal protection in the area of sex discrimination, then a greater incidence of success by those attacking sex classifications in future cases can be anticipated.

Sail'er Inn may even have an influence upon those courts that choose not to apply the "strict scrutiny" standard to sex classifications. The California court's finding that the state had shown "no interest at all" in support of the statute suggests that the exclusion of women from bartending would not have survived even the "rational basis" test of equal protection. If other courts can be persuaded to follow this example and carefully analyze any alleged state interests that are advanced to justify sex discrimination, then it is likely that future decisions will more frequently accord with *Sail'er Inn* in result, if not precisely in legal theory.

Finally, *Sail'er Inn* must be recognized as a challenge to the Supreme Court to reexamine its traditional position on the constitutionality of sex discrimination, since the California statute was expressly held to be in violation of the equal protection clause of the fourteenth amendment. Although the court made a ritual

⁴⁴ Id. at 542, 95 Cal. Rptr. at 342.

⁴⁵ Id. at 543, 95 Cal. Rptr. at 343.

⁴⁶ *United States ex rel. Robinson v. York*, 281 F. Supp. 8 (D. Conn. 1968). Cf. *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966); *Commonwealth v. Daniel*, 430 Pa. 642, 243 A.2d 400 (1968).

attempt to distinguish *Goesaert*,⁴⁷ the main thrust of the *Sail'er Inn* opinion is irreconcilable with the sexist assumptions underlying that case, and the California court has in effect rejected its authority. This is an open invitation to the Supreme Court to reexamine *Goesaert* and similar decisions in the light of contemporary understanding of sex discrimination.

Finally, we note a recent case involving alleged discrimination against *men*.⁴⁸ A New York statute required the fingerprinting of all male employees of liquor wholesalers. A wholesaler whose license was cancelled for failure to comply with the fingerprinting requirement brought an action to have his license restored, on the ground that the requirement was discriminatory and therefore invalid.

This contention was rejected by the court on the ground that a rational basis exists for requiring fingerprints of male employees only. The legislature, it said, must have been concerned about the possibility that "strong-arm" tactics would be used by wholesalers against retailers in order to obtain business (a practice apparently dating back to Prohibition). In addition, the legislature apparently concluded that wholesalers would be likely to employ men for this purpose, but not women. Conceding this reasoning to be "slightly tenuous,"⁴⁹ the court nevertheless deferred to the legislative determination.

Sophisticated training in the use of physical force against another person is, of course, widely available to both men and women. Women who have mastered karate, judo or the use of firearms can injure or kill an adversary as easily as any man. How, then, can the legislative distinction be rationally justified? Only, it would seem, by clear evidence that women would not in fact *utilize* their destructive capabilities to further such illegal solicitation. The court concluded that such utilization would be "highly improbable," but failed to suggest any basis for this conclusion. Recent arrests of mugging gangs including females suggest that the conclusion is tenuous at best. This 1970 decision

⁴⁷ The court distinguished *Goesaert* on the ground that the Michigan statute permitted women to tend bar only under circumstances where a close male relative was the actual owner of the bar and presumably could be expected to supervise the female bartender's activities. The California statute, on the other hand, contained an exception which allowed female owners to tend bar even in the absence of a male "protector." 485 P.2d 543, 95 Cal. Rptr. at 343. Thus *Goesaert*'s protectionist rationale could not sustain the California statute.

⁴⁸ *Vintage Soc'y Wholesalers Corp. v. State Liquor Authority*, 63 Misc. 2d 287, 311 N.Y.S.2d 735 (Sup. Ct. 1970).

⁴⁹ *Id.* at 289, 311 N.Y.S.2d at 739.

plainly demonstrates the stubborn persistence of the old myth of woman as a frail and delicate creature.

3. *Wrestling*

In its expression of male dissatisfaction with women's changing status, and of willingness to obstruct further change wherever possible, *State v. Hunter*⁵⁰ is a remarkable recent descendant of Mr. Justice Bradley's opinion in *Bradwell v. Illinois*.⁵¹ An Oregon statute regulating wrestling "exhibitions" totally excluded females from participation. The court upheld it against an equal protection challenge, purporting to find a rational basis for the exclusionary classification:

We believe that we are justified in taking judicial notice of the fact that the membership of the legislative assembly which enacted this statute was predominantly masculine. The fact is important in determining what the legislature might have had in mind with respect to this particular statute, in addition to its concern for the public weal. It seems to us that its purpose, although somewhat selfish in nature, stands out in the statute like a sore thumb. Obviously it intended that there should be at least one island on the sea of life reserved for man that would be impregnable to the assault of woman. It had watched her emerge from long tresses and demure ways to bobbed hair and almost complete sophistication; from a creature needing and depending upon the protection and chivalry of man to one asserting complete independence. She had already invaded practically every activity formerly considered suitable and appropriate for men only. In the field of sports she had taken up, among other games, baseball, basketball, golf, bowling, hockey, long distance swimming, and racing, in all of which she had become more or less proficient, and in some had excelled. In the business and industrial fields as an employe or as an executive, in the professions, in politics, as well as in almost every other line of human endeavor, she had matched her wits and prowess with those of mere man, and, we are frank to concede, in many instances had outdone him. In these circumstances, is it any wonder that the legislative assembly took advantage of the police power of the state in its decision to halt this ever-increasing feminine encroachment upon what for ages had been considered strictly as manly arts and privileges? Was the Act an unjust and unconstitutional discrimination against woman? Have her civil or political rights been unconstitutionally denied her? Under the circumstances, we think not.⁵²

This passage reveals, as clearly as any we have seen, that male judges are now fully aware of the growing dissatisfaction of many women with their male-imposed subordinate status. Significantly,

⁵⁰ 208 Ore. 282, 300 P.2d 455 (1956).

⁵¹ See text accompanying note 10 *supra*.

⁵² 208 Ore. at 287-88, 300 P.2d at 457-58.

judges will even concede that, once admitted to many of the spheres of human activity formerly denied them, women have performed at least as competently as men. Nevertheless, this court openly applauds legislative resistance to further female "encroachment," disdaining to conceal its male bias behind any protectionist facade such as the preservation of women's health or the prevention of "social problems." Candor, yes. Even-handed administration of justice by an impartial tribunal, no. Indeed, the opinion virtually glories in its own revealed bias.

The same issue was raised recently in New York, where the State Athletic Commission refused to license female wrestlers.⁵³ An action seeking to invalidate this rule was dismissed by the Appellate Division⁵⁴ with the following comments:

It has been argued that females have fared less well under the Equal Protection Clause than have males of certain minority groups which have long been the victims of discrimination. . . . Furthermore, the presumption of constitutionality of a classification requires the courts to *assume* the existence of a reasonably conceivable state of facts to sustain it. . . . It has also been suggested that the Commission's determination is founded on a mid-Victorian concept which females have long since abandoned and which has no place in this enlightened last third of the Twentieth Century. Notwithstanding any personal opinion or attitude we may hold in this respect, there is legal justification and support, under the legislation which created the Commission, for the determination made by it.⁵⁵

Even assuming that the court has stated the proper equal protection test, what "reasonably conceivable state of facts" justifies this particular discriminatory classification? *Stating* a test is no substitute for *applying* it. At an earlier point, the opinion contains a vague reference to past "infestation" of boxing and wrestling by "undesirable elements." Even if this is true, what is the rational connection between such infestation and the challenged rule? The court was silent. While the opinion is by no means an expression of overt sexism like *State v. Hunter*, it is also a far from satisfactory exposition of the reasoning process by which the decision was reached. If there was any rational basis for the exclusion of women from wrestling, it does not emerge from a reading of the opinion.

⁵³ N.Y. Unconsol. Laws § 8906 (McKinney 1961) confers upon the commission "sole control . . . over all licenses to . . . persons who participate in . . . wrestling matches or exhibitions." Pursuant to this authorization, Rule A-14, denying wrestling licenses to women, was promulgated.

⁵⁴ *Calzadilla v. Dooley*, 29 App. Div. 2d 152, 286 N.Y.S.2d 510 (4th Dep't 1968).

⁵⁵ *Id.* at 156-57, 286 N.Y.S.2d at 516 (emphasis added).

4. *Appointment of Administrators*

Unlike corporate fiduciaries, individuals do not customarily make a business of serving as executors or administrators. In that respect, a limitation upon service by women in these fiduciary capacities is not a business or professional exclusion. But competent estate administration does require, among other things, sound judgment, administrative ability and an understanding of business practices. Male domination of the business world is a historical fact, although not nearly so pronounced now as previously.⁵⁶ In view of all this, may the legislature validly mandate a preference for males over females in the appointment of administrators?

This is the question raised by *Reed v. Reed*.⁵⁷ In Idaho, persons applying for letters of administration are entitled to judicial consideration according to a statutory order of priorities. The statute favors certain classes of relatives of the decedent over others and prefers all eligible relatives before creditors.⁵⁸ Certain persons are completely disqualified, including nonresidents, infants, criminals and those adjudged incompetent to perform the duties of administrator "by reason of drunkenness,

⁵⁶ The National Association of Bank Women reports that 270 women are bank chairmen or presidents, 20 are senior vice-presidents and 50 are executive vice-presidents. For Women, A Difficult Climb to the Top, *Bus. Week*, Aug. 2, 1969, at 42, 44. "The National Association of Bank Women, Inc. . . . is an organization of 6,431 women holding bank corporate titles [M]embership includes about one-third of all women officers in the country." Foster, *Executive Potential on the Distaff Side*, *Business*, June 1969, at 47. Moreover, about 10% of all accountants and 2% of all CPA's are women. A. King, *Career Opportunities for Women in Business* 68 (1963).

Many women also have less specialized business experience. In 1968, over one million women were managers, officials or proprietors. U.S. Dep't of Labor, Women's Bureau Bull. No. 294, 1969 Handbook on Women Workers 90 (1969). Also, over 16,000 or 58.8% of women workers held white collar jobs. *Id.* Finally, 406 women earned master's degrees in business and commerce (2.7% of the degrees awarded), and 106 earned degrees in economics (9.5% of the total). More than 5,000 bachelor's degrees in business and commerce (8.6%) and over 1,000 degrees in economics were awarded to women. *Id.* Furthermore, in 1956, there were 5,900 women life insurance agents, about 3% of the total full-time underwriters. At the same time women made up about 1% of the agency managers and assistants. U.S. Dep't of Labor, Women's Bureau Bull. No. 229, *Life Insurance Selling, Careers for Women as Life Underwriters* 5 (1961).

⁵⁷ 93 Idaho 511, 465 P.2d 635 (1970), prob. juris. noted, 401 U.S. 934 (1971).

⁵⁸ Idaho Code § 15-312 (1948) establishes the order of priorities as:

- (1) surviving spouse,
- (2) children,
- (3) parents,
- (4) brothers [!],
- (5) sisters [!],
- (6) grandchildren . . .
- (10) creditors

improvidence or want of understanding or integrity.”⁵⁹ Within any eligible class the probate court may grant letters to more than one person.⁶⁰ The controversial requirement is this: “Of several persons claiming and equally entitled to administer, males must be preferred to females”⁶¹

The disqualification provision makes it clear that the court is not required to prefer *incompetent* males over competent females; on the other hand, it also plainly shows that the purpose of the male preference provision could not be simply to prevent the selection of incompetent females. Rather, among members of the highest eligible category, none of whom is otherwise disqualified, the court is required to give preference to males.

In *Reed*, the decedent was survived by both adoptive parents. Each parent applied separately for letters of administration, and the probate court obeyed the legislative command by appointing the father. The mother then challenged this appointment on the ground that the male preference provision denied her equal protection of the laws. She was successful in the district court, but that judgment was reversed by the Supreme Court of Idaho.

That court purported to apply the “rational connection” test to determine whether or not the male preference requirement was so arbitrary and capricious as to violate equal protection. It was able to suggest two possible motives for the legislature’s action: (1) promotion of prompt settlement of estates by curtailing disputes over the appointment of administrators; and (2) a feeling that men are generally better qualified than women to act as administrators. The second proposition apparently troubled the court somewhat, prompting this further amplification:

While this classification may not be entirely accurate, and there are doubtless particular instances in which it is incorrect, we are not prepared to say that it is so completely without a basis in fact as to be irrational and arbitrary.⁶²

Both of these rationales are faulty, even if one concedes that the appropriate standard of judicial review is “rational connection.” There is an obviously legitimate state interest in expediting the process of estate administration; that does not mean, however, that every means by which this interest may be furthered is rational. Requiring every successful applicant to have red hair or demonstrate a capability to jog two miles in sixteen

⁵⁹ Id. § 15-317.

⁶⁰ Id. § 15-315.

⁶¹ Id. § 15-314.

⁶² 93 Idaho at 514, 465 P.2d at 638.

minutes would undoubtedly reduce the number of competitors for appointment and thereby curtail litigation, but such requirements would have no rational connection with fitness to act as an administrator. The expediting-of-appointments argument is thus clearly a makeweight.

The second rationale, then, must be the decisive one. The court suggested that the Idaho Legislature had apparently determined that, as compared with men, women are generally deficient in business acumen. Nevertheless, the court conceded that such a characterization was not universally accurate; hence, a particular female applicant might in fact be as well or even better qualified to administer an estate than her male counterpart. Despite the obvious possibility that such cases will arise, the statute leaves the probate judge no discretion: Where the applicants are equally qualified, the male must be appointed; indeed, he must be preferred to the female even if he is in fact demonstrably *less* qualified. A clearer case of arbitrariness can hardly be imagined.

Perhaps the pernicious effect of the male preference requirement can be further illuminated by consideration of an analogous statute discriminating on the basis of race rather than sex.⁶³ Suppose the Idaho Legislature had enacted a similar statute which mandated a preference for whites over nonwhites. Also, suppose that a particular decedent had no immediate family or that no member of his family wished to administer his estate; consequently, creditors of the estate would be eligible for appointment as administrator. Also suppose that the estate has only two creditors: Ebony Trust Co. and Joe's Grocery. The senior trust officer of the former (a black man) and the proprietor of the latter (white) have applied for letters of administration. While the grocer is a respected citizen operating a successful business, he did not finish high school, and has never served as a personal representative. Unless disqualified "for want of understanding or integrity," however, he must be appointed.

The trust officer appeals from the order of appointment, challenging the statute on equal protection grounds. Both arguments advanced by the court in *Reed* could be relevant here: the statutory preference for whites could help to avoid time-consuming controversies; and it might be shown that, on the average, whites have more formal education, more responsible jobs and more business experience than blacks.

⁶³ Analogies to racial discrimination will also be suggested with regard to other specific issues discussed in later sections. The general aptness of the race analogy to sex discrimination cases is considered in Section III, *infra*.

Would these two arguments be sufficient to sustain the hypothetical statute against the trust officer's constitutional attack? Obviously not: the statute is based on an assumption of racial inferiority that is clearly invidious as applied to this individual appellant.

Can the statute in *Reed* be logically distinguished from this hypothetical statute? We would suggest that it cannot. Both types of discrimination rest on the fallacious assumption that generalizations which can accurately be made about a class as a whole are equally accurate with respect to each individual member of the class. In addition, statutes mandating various types of sex discrimination have reinforced a historical pattern of male domination over females. In this respect, such statutes serve the same function as statutes discriminating on the basis of race: they support and strengthen the power of one group (and its individual members) to dominate the members of another.

5. *The "Judicial Process" in Female Exclusion Cases*

With the notable exceptions of *Paterson Tavern & Grill Owners Association* and *Sail'er Inn*, the opinions considered so far reveal three distinct forms of rationalization used to uphold state legislation that excludes or disadvantages females with respect to various occupations or offices. These include: (1) express reliance on a mythology of male supremacy, which confines women to a subordinate social role and then patronizingly "protects" them against even their own attempts to change that role; (2) total deference to the legislature, despite serious assertions that its discriminatory enactments violate specific constitutional guarantees; and (3) cursory dismissal of these serious constitutional issues, on the basis of inadequately supported conclusions that rational connections do exist between sex discrimination and the promotion of some vaguely articulated state interest. The first of these is crude, unjudicial and offensive to an increasingly large number of both men and women. The other two are inadequate substitutes for clear thinking and reasoned analysis. Taken together, they constitute a pattern of flagrant judicial insensitivity to the injustice visited upon women by male-dominated state legislatures.

This pattern, we believe, will also be evident in the areas surveyed in the remainder of our discussion.

B. *Labor Regulation*

It is a transcendent irony that one of the most celebrated and widely respected decisions in the history of the Supreme

Court has, after sixty-odd years, come to be viewed as a "road-block to the full equality of women."⁶⁴ The case is, of course, *Muller v. Oregon*,⁶⁵ Brandeis brief and all. *Muller*, it will be remembered, upheld the constitutionality of an Oregon statute that restricted the employment of women in any "mechanical establishment, or factory, or laundry" to ten hours per day. Three years earlier, in *Lochner v. New York*,⁶⁶ the Court had declared unconstitutional a New York law regulating maximum hours of work for all bakery employees, male as well as female. *Muller* did not overrule *Lochner*, but distinguished it on the ground that women require special treatment which the legislature may properly require employers to supply. Here is the relevant portion of the opinion:

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the school room are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation

⁶⁴ Murray, *The Rights of Women*, in *The Rights of Americans* 521, 525 (N. Dorsen ed. 1971). For a much earlier statement of a similar view, see Comment, 13 B.U.L. Rev. 276 (1933).

⁶⁵ 208 U.S. 412 (1908).

⁶⁶ 198 U.S. 45 (1905).

designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her.⁶⁷

The second quoted paragraph seems shockingly close to *Bradwell* in its male supremacist assumptions. The first properly recognizes that pregnant women are not able to perform some of the tasks that men or nonpregnant women do. Significantly, though, the statute applies to *all* women, whether pregnant or not: Thus, the court was moved to imply that woman's primary social function is reproduction. This idea is, of course, an integral part of the "grand design" myth. While the *Muller* opinion is slightly more restrained than Justice Bradley's concurring opinion in *Bradwell*, its sexist assumptions are no different.

It now seems unfortunate that the Court did not expressly overrule *Lochner* and hold that "freedom of contract" does not inhibit states from exercising their police power to set maximum working hours. The sexist rationale would then not have been necessary, and the judiciary would have been deprived of one of its most frequently cited authorities for the general proposition that sex is a valid basis for legislative classification.⁶⁸

⁶⁷ 208 U.S. at 421-23.

⁶⁸ In *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), for example, the Court upheld a minimum wage statute for women by forthrightly rejecting the *Lochner* rationale and clearly establishing the principle that "freedom of contract" is no bar to state regulation of wages and working conditions. *Id.* at 391-95. While the Court did uphold a species of sex discrimination in *Parrish*, and in passing quoted several of *Muller's* sexist statements with apparent approval, it

The constitutional issues raised by protective legislation have not been in the spotlight in recent years, due to the enactment of Title VII of the Civil Rights Act of 1964, which prohibits sex-based discrimination in employment unless the employee's sex is "a bona-fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."⁶⁹ In the wake of *Muller* and similar cases, several states enacted statutes regulating employment of women in a variety of respects.⁷⁰ In addition to wage and hour standards, these included limitations on the poundage that women could be required to lift. Since the effect of such laws frequently is to render women ineligible for certain jobs, their validity under Title VII was soon questioned.⁷¹ The Equal Employment Opportunity Commission has taken the position that protective regulations "have ceased to be relevant to our technology or the expanding role of female workers in our economy" and should not therefore be a defense to an otherwise unlawful employment practice.⁷² Several courts have now held that Title VII supersedes conflicting state protective laws as a matter of federal supremacy.⁷³ The issue will very likely make its way to the Supreme Court. To the extent that Title VII is held to invalidate such state regulation, *Muller* will have been superseded by congressional fiat.⁷⁴

is possible that the Court would today be less ready to sustain such a statute against an equal protection (as opposed to a due process) attack.

⁶⁹ Civil Rights Act of 1964, § 703(e), 42 U.S.C. § 2000e-2(e) (1964). For a discussion of the application of Title VII to sex discrimination, see Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, *supra* note 3, at 1166-95.

⁷⁰ For a discussion of protective statutes currently in force in a number of states, see Murray, *supra* note 64, at 537-39.

⁷¹ See generally Oldham, Sex Discrimination and State Protective Laws, 44 Denver L.J. 344 (1967).

⁷² 29 C.F.R. § 1604.1 (b) (1971).

⁷³ *Rosenfeld v. Southern Pac. Co.*, No. 71-23983 (9th Cir., June 1, 1971); *Ridinger v. General Motors Corp.*, 325 F. Supp. 1098 (S.D. Ohio 1971); *Kober v. Westinghouse Elec. Corp.*, 325 F. Supp. 467 (W.D. Pa. 1971); *Caterpillar Tractor Co. v. Grabiec*, 317 F. Supp. 1304 (S.D. Ill. 1970); *Richards v. Griffith Rubber Mills Corp.*, 300 F. Supp. 338 (D. Ore. 1969); *Southern Cal. Edison Co. v. Utility Workers Local 246*, 61 CCH Lab. Cas. ¶ 9369 (C.D. Cal. 1969); *Sail'er Inn, Inc. v. Kirby*, Sup. Ct. 485 P.2d 529, 95 Cal. Rptr. 329 (1971). See also *Mengelkoch v. Industrial Welfare Comm'n*, 284 F. Supp. 956 (C.D. Cal.), appeal dismissed and remanded, 393 U.S. 83 (1968). But see *Krauss v. Sacramento Inn Corp.*, 314 F. Supp. 171 (E.D. Cal. 1970); *Ward v. Luttrell*, 292 F. Supp. 162 (E.D. La. 1968).

Title VII also prevails over privately imposed sex discrimination of a like nature. See *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969); *Cheatwood v. South Cent. Bell Tel. & Tel. Co.*, 303 F. Supp. 754 (M.D. Ala. 1969); *Division of Human Rights v. New York-Pa. Professional Baseball League*, 36 App. Div. 2d 364, 320 N.Y.S.2d 788 (4th Dept. 1971).

⁷⁴ If weightlifting and similar regulations are invalidated by Title VII, then

Meanwhile, the Court has ruled on another aspect of Title VII in *Phillips v. Martin Marietta Corp.*⁷⁵ In that case, the employer's policy was to refuse even to consider hiring females with preschool children for a certain position, although no such exclusion was made in the case of similarly situated males. An unsuccessful female applicant challenged this policy, contending that it was a per se violation of the statute. This contention was rejected, and the case was remanded for further proceedings to determine whether or not the policy was within the bona fide occupational qualification exception.

Although Title VII has substituted the supremacy issue for equal protection where state-mandated sex discrimination is concerned, its ultimate effect may be to induce some judges to rethink their position on the broader question of sex discrimination and equal protection. If it does, the reason will be the bona fide occupational qualification exception. In *Richards v. Griffith Rubber Mills*,⁷⁶ for instance, an employer refused to promote a woman because of a state regulation prohibiting women from lifting more than fifty pounds; in the new job, she would occasionally be required to lift as much as sixty pounds. The court conceded that the regulation was probably valid under *Muller*, but nevertheless held it invalid under Title VII, which

no longer permits either employers or the states to deal with women as a class in relation to employment to their disadvantage. . . . Individuals must be judged as individuals and not on the basis of characteristics generally attributed to racial, religious, or sexual groups.⁷⁷

That "individuals must be judged as individuals" is, of course, also the essence of the equal protection argument. The reasoning employed in *Richards* to find a violation of Title VII could thus just as easily be used to strike down, on equal protection grounds, any state regulation that discriminates against individuals solely on the basis of their sex.

*Weeks v. Southern Bell Telephone & Telegraph Co.*⁷⁸ also involved an employer's refusal to consider hiring women for certain jobs on the ground that these jobs were too "strenuous" for females. The court not only narrowly construed the bona fide

exclusionary statutes of the sort discussed in the previous section will also fall unless based on a "bona fide occupational qualification." Title VII does not extend beyond employment discrimination, however. Hence, the constitutional issues will be decisive in an area such as public accommodations, discussed in the next section.

⁷⁵ 400 U.S. 542 (1971).

⁷⁶ 300 F. Supp. 338 (D. Ore. 1969).

⁷⁷ Id. at 340.

⁷⁸ 403 F.2d 228 (5th Cir. 1969).

occupational qualification exception, but placed on the employer the burden "of proving that he had reasonable cause to believe, that is, a *factual basis* for believing, that *all or substantially all* women would be unable to perform safely and efficiently the duties of the job involved."⁷⁹ This test seems less stringent than the principle stated in *Richards*, in that it would not necessarily invalidate every discrimination based on attributed group characteristics. On the other hand, it clearly prohibits discrimination justifiable only by reference to characteristics attributed to an "average" member of the affected group.⁸⁰

C. Places of Public Accommodation

Statutes and ordinances prohibiting women from patronizing bars or taverns, or regulating the manner of their patronage, were the subject of a flurry of litigation in the early twentieth century. These regulations, like those excluding women from working in bars, apparently reflected a strongly held belief that the combination of men, women and liquor in such places would be somehow detrimental to "public morality."

In an influential 1902 Colorado case,⁸¹ a saloon owner sought to enjoin the enforcement of such a regulation on constitutional grounds. A Denver ordinance, authorized by a provision of that city's charter, prohibited keepers of "liquor saloons, dram shops, or tipping houses" from admitting any women to their establishments, either as customers or as employees. The petitioner had argued that a woman had the same right as a man to enter a saloon and buy a drink of liquor, and that to forbid him to sell liquor to women was therefore an unjustified interference with his business and a deprivation of property without due process of law. Granting its major premise, this argument seems compelling. The court, however, was not at all impressed. While conceding some validity to the petitioner's case, it nevertheless found a reason to sustain the ordinance:

If a discrimination is made against women solely on account of their sex, it would not be good; but if it is because of the immorality that would be likely to result if the regulation was not made, the regulation would be sustained. That injury to public morality would ensue if women were permitted without restrictions to frequent wine rooms, there to be supplied with liquor, is so ap-

⁷⁹ *Id.* at 235 (emphasis added).

⁸⁰ For a criticism of the *Weeks* decision, see Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, *supra* note 3, at 1179-81.

⁸¹ *Adams v. Cronin*, 29 Colo. 448, 69 P. 590 (1902), *aff'd*, 192 U.S. 108 (1904).

parent to the average person that argument to establish so plain a proposition is unnecessary. But if some people might not be willing to concede this, it is enough to say that the general assembly, speaking through the city council, with whom the decision entirely rests, has so determined. Women, therefore, may properly be excluded from wine rooms, as this ordinance provides, and, if they have no constitutional right to insist upon being admitted to places there to be supplied with liquor, when the effect would be demoralizing to society, *a fortiori* the saloonkeeper may be prevented from furnishing them facilities for contributing to that result. . . . [T]he classification made with respect to the persons permitted to frequent wine rooms for supplying themselves there with liquor [is] based upon reasons that have their seat in the facts of nature, and . . . such regulations are conducive to, and are reasonably adapted to secure, the worthy object of preserving public morality.⁸²

A contrary result had been reached, however, in a 1900 Kentucky case. There the ordinance not only prohibited women from going into or out of saloons, but also made it a misdemeanor for any woman to "frequent, loaf, or stand around" within fifty feet of such an establishment. Penalties for violation of the ordinance could be assessed against both the offending female and any saloon keeper who permitted her to enter. In *Gastenu v. Commonwealth*,⁸³ a saloon keeper convicted of violating this ordinance appealed on constitutional grounds. The prosecution argued that the ordinance had been enacted because "very disreputable, low and vile women congregate in and about saloons and places where liquor is sold, thereby causing affrays, fights, murder, and other crimes."⁸⁴ Agreeing that regulation of the conduct of such women was a proper subject for exercise of the police power, the court nevertheless held the statute invalid for overbreadth. For instance, it pointed out that lawful activities might quite properly bring even morally upstanding women within fifty feet of saloons. Furthermore, the court doubted whether well-behaved females could be excluded from frequenting saloons so long as their behavior was orderly and their purpose was lawful. The ordinance was held to be "unreasonable and an unnecessary interference with individual liberty."⁸⁵

Six years later, however, Kentucky courts were again presented with a challenge to the constitutionality of a similar ordinance, which provided as follows:

It shall be unlawful for any infant or female to go into or be

⁸² Id. at 496-97, 69 P. at 593.

⁸³ 103 Ky. 473, 56 S.W. 705 (1900).

⁸⁴ Id. at 475.

⁸⁵ Id.

in and drink intoxicating liquors in any saloon . . . or for the keeper or proprietor or controller, or one in charge of such room or place of business, to suffer and admit such infant or woman to drink therein or to be or remain for over five minutes It shall be a defense to this ordinance if the person charged with its violation shall show that such infant or female was of good repute and was at the time sober and orderly and had the consent so to do of the parent or guardian of the infant or husband of the female, or in case of reasonable necessity.⁸⁶

A prosecution for violation of this ordinance was dismissed by the circuit court, and the state appealed. The Court of Appeals upheld the ordinance, distinguishing *Gasteneau* on the ground that the overbreadth found in that case was not repeated in this ordinance.⁸⁷ The court was apparently convinced that the new ordinance offered sufficient protection to orderly, well-behaved women who visited saloons for lawful purposes, even though it placed upon defendants the burden of proving that they were within one of the exceptions stated in this ordinance.

Nevertheless, the ordinance was frankly sexist. It classed women with infants, as creatures requiring man's protection. It subjected any woman who remained in a saloon more than five minutes to the possibility of a criminal charge, and then placed the burden on *her* to justify herself—on the assumption, no doubt, that most females in bars for over five minutes were a threat to public morals. For married women, it required a showing of spousal consent, confirming the male role as woman's keeper or guardian.

Why should such an ordinance be enacted? Why did the court so readily agree that, when certain women are present together with liquor in a saloon, they "cause" men to fight and murder? Was the ordinance designed to keep "nice" girls "nice," by discouraging them from going into saloons? To protect men from their own antisocial, aggressive impulses? To make bars into male sanctuaries? To keep the husbands of "good" women from being tempted into liaisons with "loose" women? Whatever the motivation for such ordinances, they achieved their aim of regulating conduct by ascribing criminal or immoral tendencies to citizens on the basis of their sex, rather than by requiring a showing of actual immoral conduct.⁸⁸ These ordinances reflect two different facets of the female stereotype in the mythology of male supremacy. On the one hand, the female is viewed as a pure, delicate and vulnerable creature who must be protected

⁸⁶ See *Commonwealth v. Price*, 123 Ky. 163, 164-65, 94 S.W. 32, 33 (1906)

⁸⁷ *Id.* at 166-67, 94 S.W. at 34.

⁸⁸ Cf. *Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971).

from exposure to immoral influences; and on the other, as a brazen temptress, from whose seductive blandishments the innocent male must be protected. Every woman is either Eve or Little Eva—and either way, she loses.

Similar ordinances can still be found in some municipalities. In a 1969 case, *Gallagher v. City of Bayonne*,⁸⁹ the ordinance prohibited tavern owners from allowing women to stand or sit at a bar; they could be served liquor only if seated at a table. Despite an earlier dictum suggesting the contrary,⁹⁰ the court held that the ordinance exceeded the limits of the city's police power. Reasoning by analogy to a recent decision invalidating a regulation which had prevented owners from allowing homosexuals to congregate at bars,⁹¹ the court concluded that the scope of permissible regulation extended to specific antisocial or immoral *acts*, but not to the "mere congregation" of women at a bar.

The practice of refusing service to women at bars is not solely the result of state law. It often reflects private policies. For instance, the Rainbow Lounge in the Hotel Syracuse had a policy against serving unescorted women at its bar, although apparently they could be served at tables. In *DeCrow v. Hotel Syracuse Corp.*,⁹² a female who had been refused service sought a federal court injunction against the continuance of this policy on the ground that it violated the equal protection clause, the Civil Rights Act of 1964⁹³ and a number of other federal civil rights statutes.⁹⁴ Her action was dismissed for lack of jurisdiction on two grounds. First, it was held that the public accommodations provisions of the 1964 Act⁹⁵ (unlike Title VII) do not prohibit sex discrimination; secondly, the equal protection clause and the other statutes were interpreted as requiring a showing of state action, which the court found to be absent in this case.

Plaintiff then proceeded in the state courts, contending that defendant's policy was in violation of various provisions of the New York Civil Rights Law. She was again unsuccessful.⁹⁶ Although the state statute provides that "all persons" are *entitled*

⁸⁹ 106 N.J. Super. 401, 256 A.2d 61 (Super. Ct. App. Div.), *aff'd per curiam*, 55 N.J. 159, 259 A.2d 912 (1969).

⁹⁰ *Eskridge v. Division of Alcoholic Beverages Control*, 30 N.J. Super. 472, 476-77, 105 A.2d 6, 9 (Super. Ct. App. Div. 1954).

⁹¹ *One Eleven Wines & Liquors, Inc. v. Division of Alcoholic Beverage Control*, 50 N.J. 329, 235 A.2d 12 (1967).

⁹² 288 F. Supp. 530 (N.D.N.Y. 1968).

⁹³ 42 U.S.C. §§ 2000a-2000h-6 (1964).

⁹⁴ *Id.* §§ 1983, 1985.

⁹⁵ *Id.* §§ 2000a-2000a-6.

⁹⁶ *De Crow v. Hotel Syracuse Corp.*, 59 Misc. 2d 383, 298 N.Y.S.2d 859 (Sup. Ct. 1969).

to full and equal facilities and privileges in places of public accommodation, it only prohibits owners from denying equality "on account of race, creed, color or national origin."⁹⁷ The court held that sex discrimination was not a violation of the latter provision. Another section of the statute declares it to be a misdemeanor for any innkeeper to refuse "without just cause or excuse, to receive and entertain any guest."⁹⁸ This provision was not violated, said the court, because the defendant did not *refuse* to serve the plaintiff; service was merely *conditioned* on the female's having an escort or being willing to sit at a table.

The first line of reasoning may be defensible on the ground that sex discrimination was not specifically prohibited by the statute; it is nevertheless a narrow construction in the light of the statute's purpose and the declaration that all persons are entitled to equal service. The second rationale, however, is indefensible: The attempt to characterize the effect of the hotel's policy as conditional service, rather than as a refusal to serve, is an exercise in sophistry. Suppose persons of a certain race were prohibited from sitting in certain sections of restaurants, or from living in certain areas of a city or riding in certain parts of a bus. Would anyone seriously contend that this is "conditional acceptance" of, rather than refusal to accept, members of that race?

The hotel's policy should have been recognized for what it was—a refusal to serve unescorted women under circumstances where unescorted men would receive service. The fact that unescorted women (and men) could sit at tables or that escorted women (or men) could sit at the bar is therefore simply irrelevant. In terms of the statute, then, the only real question is whether or not this refusal of service was for "just cause or excuse." It was incumbent upon the court to inquire as to the reasons for the defendant's policy and then to test them against the statute's purpose of guaranteeing freedom from discrimination in places of public accommodation. By resorting to the specious "conditional service" rationale, the court abdicated this responsibility.

Private discrimination was again challenged on federal constitutional grounds in *Seidenberg v. McSorley's Old Ale House, Inc.*⁹⁹ The facts were similar to the *DeCrow* cases, except that no female had ever been served at the defendant's establishment, at the bar or elsewhere. Declining to follow the first *DeCrow*

⁹⁷ N.Y. Civ. Rights Law § 40 (McKinney 1948).

⁹⁸ Id. § 40-e (McKinney Supp. 1970).

⁹⁹ 317 F. Supp. 593 (S.D.N.Y. 1970).

decision, however, the district court denied a motion to dismiss the action for want of jurisdiction.¹⁰⁰ There being no issue as to any material fact, both parties moved for summary judgment, and the plaintiff's motion was granted.

In order to reach the constitutional issue, the court first had to find that the defendant's exclusionary policy constituted state action. It conceded that the Supreme Court has never ruled that a private commercial enterprise is subject to the fourteenth amendment solely because it is licensed by the state. The court nevertheless held that the compelling public interest in the liquor trade, coupled with New York's pervasive regulatory scheme, justified the requirement that the defendant conduct its business on the same principle of equality applicable to the state itself.

Having reached the equal protection issue, the court proceeded to test defendant's policy against the rational basis standard:

In the case before us no difference between men and women, as potential customers of the defendant, has been offered as a rational basis for serving the one and not the other. It may be argued that the occasional preference of men for a haven to which they may retreat from the watchful eye of wives or womanhood in general to have a drink or pass a few hours in their own company, is justification enough; that the simple fact that women are not men justifies defendant's practice. The answer is that *McSorleys'* is a public place, not a private club, and that the preferences of certain of its patrons are no justification under the Equal Protection Clause. Such preferences, no matter how widely shared by defendant's male clientele, bear no rational relation to the suitability of women as customers of *McSorleys'*.

Nor do we find any merit in the argument that the presence of women in bars gives rise to "moral and social problems" against which *McSorleys'* can reasonably protect itself by excluding women from the premises. . . . Outdated images of bars as dens of coarseness and iniquity and of women as peculiarly delicate and impressionable creatures in need of protection from the rough and tumble of unvarnished humanity will no longer justify sexual separatism.¹⁰¹

In *Seidenberg*, as in *Gallagher*, a court has finally repudiated the notion that every woman should be viewed as either an innocent or a temptress—and in either case, as somehow man's inferior—to be guarded or guarded against. Once this attitude has been overcome, there is no further justification for discrimina-

¹⁰⁰ *Seidenberg v. McSorley's Old Ale House, Inc.*, 308 F. Supp. 1253 (S.D.N.Y. 1969).

¹⁰¹ 317 F. Supp. at 605-06.

tion against female patrons in bars. These two opinions have established a new model for judicial review of discriminatory ordinances and policies applicable to places of public accommodation.

Their influence need not be confined to this area of law, however. Many kinds of sex discrimination are rationalized, even today, on the basis of stereotypes just as simplistic and exaggerated as those reflected in the liquor cases. As other courts are persuaded to follow the example set in *Sail'er Inn*, *Seidenberg* and *Gallagher*, they will be obliged to make a more searching inquiry into the rationality of any sex classification challenged on equal protection grounds. They will no longer be content to uphold discriminatory laws merely as a gesture of total deference to the legislature or as a shield against some ill-defined threat to public morality. Even more importantly, they will reexamine their own uncritical acceptance of stereotypical ideas about sex characteristics as appropriate grounds for legislative distinctions.

D. Jury Qualification

The common law jury, grand and petit, was exclusively a male institution.¹⁰² The right (or duty) of women to serve as jurors was not recognized in America until the early twentieth century, when women began to obtain voting rights.¹⁰³ There is, however, one series of nineteenth-century opinions from the Washington Territory which vividly suggests how one male judge viewed the desirability of permitting women to serve on juries.

A Washington statute provided that all "qualified electors" were eligible to serve as petit jurors and all "qualified electors and householders" were eligible to serve as grand jurors. In *Rosencrantz v. Territory*,¹⁰⁴ a female defendant had been indicted by a grand jury composed in part of married women living with their husbands. She appealed, claiming that her indictment had been returned by an improperly constituted grand jury. The Supreme Court of the Territory denied her appeal, noting that the franchise had been extended to Washington women by statute and that the female jurors were thus "qualified electors." But the court construed the statute as requiring grand jurors to be *both* "qualified electors" and "householders." Whether a married woman living with her husband could be a "householder" was thus the determinative issue. The court con-

¹⁰² The sole exception was a jury of females called to determine the fact of pregnancy. 3 W. Blackstone, Commentaries *362 (1775).

¹⁰³ See generally *Fay v. New York*, 332 U.S. 261, 289-90 (1947).

¹⁰⁴ 2 Wash. Terr. 267, 5 P. 305 (1884).

cluded that the local Married Women's Act conferred sufficient joint control over the family property and children so that both husband and wife could be deemed "householders" within the meaning of the jury statute. The majority opinion did not discuss the desirability of having women on juries; it did, however, suggest that the principle of equality expressed in the Married Women's Act constituted a "spirit of progress."¹⁰⁵

The decision evoked a furious dissent from Judge Turner. He contended that, in light of the jury's history as an institution, "qualified electors" was meant to refer exclusively to qualified *male* electors; in any event, he argued, married women were not "householders." In elaborating the first of these two arguments, he revealed a strong opinion on the underlying question of policy:

It is said that the rights of the weaker sex, if I may now call them so, are more regarded than in the days of Blackstone, and that the theory of that day, that women were unfitted by physical constitution and mental characteristics to assume and perform the civil and political duties and obligations of citizenship, has been exploded by the advanced ideas of the nineteenth century. This may be true. No man honors the sex more than I. None has witnessed more cheerfully the improvement in the laws of the states, and particularly in the laws of this territory, whereby many of the disabilities of that day are removed from them, and their just personal and property rights put upon an equal footing with those of men. I cannot say, however, that I wish to see them perform the duties of jurors. The liability to perform jury duty is an obligation, not a right. In the case of woman, it is not necessary that she should accept the obligation to secure or maintain her rights. If it were, I should stifle all expression of the repugnance that I feel at seeing her introduced into associations, and exposed to influences which, however others regard it, must, in my opinion, shock and blunt those fine sensibilities, the possession of which is her chiefest charm [*sic*], and the protection of which, under the religion and laws of all countries, civilized or semi-civilized, is her most sacred right.

If one woman is competent as a juror, all women having the same qualifications are competent. If women may try one case, they may try all cases. It is unnecessary to say more; to suggest the shocking possibilities to which our wives, mothers, sisters, and daughters may be exposed, unless the legislature should hereafter relieve us from what I believe to be a mistaken construction of the law. These observations, however, are not pertinent here. The question is, what is the law? I say that the law now concerning the important incidents of a jury trial are, by express constitutional provision, what they were at the common law, and that under that law a jury was no jury unless it was composed of men.¹⁰⁶

¹⁰⁵ *Id.* at 274, 5 P. at 306.

¹⁰⁶ *Id.* at 278-79, 5 P. at 309-10.

Judge Turner had an equally strong view on the question of whether a married woman living with her husband could be a "householder" within the meaning of the statute:

The husband was not only the head of the family at common law, because under that law he had the right to be obeyed by all the family, including the wife, but because of inherent and acquired differences between himself and wife in mental and physical constitution. He was better fitted to wage the war for present subsistence, and to accumulate the competence that was to make provision against want in the future. The experience gained by him in prosecuting this branch of the partnership matured his judgment, strengthened his will, and made him confident and self-reliant. I believe that the facts I have mentioned obtain to this day, and that they operate and will continue to operate to give the husband paramount authority in the household, as that term is understood at common law, until an upheaval of nature has reversed the position of man and woman in the world. Legislative enactment would not make white black, nor can it provide the female form with bone and sinew equal in strength to that with which nature has provided man. No more can it reverse the law of cause and effect, and clothe a timid, shrinking woman, whose life theater is and will continue to be and ought to continue to be, primarily the home circle, with the masculine will and self-reliant judgment of a man.¹⁰⁷

Three years later, in *Harland v. Territory*,¹⁰⁸ the same court was faced with the same issue of jury service by women. Perhaps in part due to personnel changes on the court, a majority of the judges joined in Judge Turner's opinion overruling *Rosenkrantz*.¹⁰⁹

Female eligibility for jury service was not widely litigated until the years immediately following World War I, when, as a result of the nationwide women's suffrage movement, the nineteenth amendment was adopted. Since jury qualification in many states was linked in some respect to voting eligibility, the extension of suffrage to women frequently raised—as it had in the Washington Territory cases—the question of whether women were thereby qualified to serve on juries.¹¹⁰

¹⁰⁷ Id. at 281, 5 P. at 311.

¹⁰⁸ 3 Wash. Terr. 131, 13 P. 453 (1887).

¹⁰⁹ The ground chosen was a narrowly technical one, but the result was sweeping: For failure to properly express its "object" in its title, the statute conferring voting rights on women in Washington Territory was held to be invalid. The result was to render women not only ineligible for jury service, but also ineligible to vote. In 1888, the Washington Legislature acted again to confer suffrage on women, but the statute was again struck down, this time as being outside the power of the territorial legislature. *Bloomer v. Todd*, 3 Wash. Terr. 599, 19 P. 135 (1888).

¹¹⁰ Of course, the nineteenth amendment took precedence over any contrary

Where the statute defined eligibility for jury service in terms of "qualified electors" or some similar phrase, many state courts held that the extension of suffrage to women automatically made them eligible to serve as jurors.¹¹¹ In other states with similar statutes, the opposite result was reached; a notable example is *Commonwealth v. Welosky*.¹¹²

In *Welosky*, the defendant challenged the array of jurors on the ground that women had been excluded. The applicable Massachusetts statute provided that every "person qualified to vote" for the legislature should be eligible for jury service.¹¹³ Despite the extension of suffrage to female citizens of Massachusetts, the court held that the legislature had not intended the reference in the statute to a "person qualified to vote" to include females:

It is unthinkable that those who first framed and selected the words for the statute now embodied in G.L.c. 234, § 1, had any design that it should ever include women within its scope. It is equally inconceivable that those who from time to time had re-enacted that statute had any such design. When they used the word "person" in connection with those qualified to vote for members of the more numerous branch of the General Court, to describe those liable to jury service, no one contemplated the possibility of women becoming so qualified. The same is true in general of those who from time to time re-enacted the statute in substantially the same words. No intention to include women can be deduced from the omission of the word male. That word was imbedded in the Constitution of the Commonwealth as a limitation upon those citizens who might become voters and thereby

provision of state law; if it had provided that jury qualifications should be equal for both sexes, no state law to the contrary would have prevailed. The amendment was universally held, however, to be directed solely at suffrage. E.g., *State v. Mittle*, 120 S.C. 526, 113 S.E. 335, writ of error dismissed for want of jurisdiction, 260 U.S. 705, cert. denied, 260 U.S. 744 (1922).

¹¹¹ E.g., *People v. Barltz*, 212 Mich. 580, 180 N.W. 423 (1920); *Parus v. District Court*, 42 Nev. 229, 174 P. 706 (1918). For a collection of cases, see Annot., 157 A.L.R. 461, 470 (1945).

¹¹² 276 Mass. 398, 177 N.E. 656 (1931), cert. denied, 284 U.S. 684 (1932). Another example is *People ex rel. Fyfe v. Barnett*, 319 Ill. 403, 150 N.E. 290 (1925). But see *People ex rel. Denny v. Traeger*, 372 Ill. 11, 22 N.E.2d 679 (1939).

¹¹³ Ten years earlier, the Supreme Judicial Court of Massachusetts had been asked by the state's House of Representatives whether, in light of the ratification of the nineteenth amendment, women were automatically qualified as jurors, and, if not, whether the legislature had the power to declare them qualified. The court answered these questions in the negative and affirmative, respectively. In re Opinion of the Justices, 237 Mass. 591, 130 N.E. 685 (1921). The jury statute under consideration in *Welosky* was the statute which had been considered in the court's earlier opinion; because of its advisory nature, however, the earlier opinion was expressly treated in *Welosky* as nonbinding (although, as the text indicates, it was not repudiated). 276 Mass. at 400, 177 N.E. at 658 (1931).

members of a class from which jurors might be drawn. It would have been superfluous also to insert that word in the statute.¹¹⁴

The court's conclusion as to legislative intent was bolstered by two other points, both of which have become familiar themes: a felt necessity to exempt at least some women from jury service, and the lack of suitable accommodations for women jurors.¹¹⁵

As in *Welosky*, most state courts treated the eligibility issue as one of statutory construction.¹¹⁶ In North Carolina, however, a constitutional issue was determinative. In *State v. Emery*¹¹⁷ it was held that the state constitution, which provided for the "ancient mode of trial by jury" and for conviction only by "a jury of good and lawful men," precluded the extension of jury service to females. The majority rested its holding entirely upon the unchallenged fact that trial by jury at the common law consisted of trial by male jurors. One dissenting justice commented on this at length:

[I] think the language of the Constitution should not be held to a rigid and inelastic construction when it conflicts with the progress of human thought and changing social conditions. It should be more liberally construed so as to meet the needs of a complex and growing civilization. I think this section of the Constitution is capable of the reasonable interpretation, in accord with modern thought, which would not disqualify women from this important service. I think it should be given this interpretation in the light of the progressive changes in the status of women and their equal share with men in the powers and responsibilities of government and justice. I do not think the courts should be restricted to the mere ascertainment of what we think now was in the minds of the framers of the Constitution who, however wisely they laid the foundations, could not envision the limitless future, else we should be fettered by the dead hand of the past.¹¹⁸

The other dissenter, however, delivered the *coup de grace* to the majority with a more laconic observation: "The most insistent argument advanced in behalf of appellants is that women have

¹¹⁴ 276 Mass. at 407-08, 177 N.E. at 661.

¹¹⁵ *Id.* at 410-11, 177 N.E. at 662. As examples of cases where these two factors were given weight, see *People v. Shannon*, 203 Cal. 139, 141-42, 263 P. 522, 523 (1928); *State v. Kelley*, 39 Idaho 668, 676, 229 P. 659, 662 (1924).

¹¹⁶ Cases which found no constitutional obstacle to the addition of women to juries include: *People ex rel. Denny v. Traeger*, 372 Ill. 11, 22 N.E.2d 679 (1939), and *Commonwealth v. Maxwell*, 271 Pa. 378, 114 A. 825 (1921). See also *United States v. Wood*, 299 U.S. 123, 145 (1936), where there is dictum to the effect that the jury trial provision of the sixth amendment is no bar to the addition of women to the jury.

¹¹⁷ 224 N.C. 581, 31 S.E.2d 858 (1944).

¹¹⁸ *Id.* at 591, 31 S.E.2d at 865 (Devin, J., dissenting).

never been permitted to serve on juries. Which goes to show that an attitude can be more formidable than an argument."¹¹⁹

As the eligibility of women for jury service came to be more widely recognized and the presence of females on juries became commonplace, two new questions were raised: Can a state properly *exclude* all women from jury service? Alternatively, can a state permit all prospective women jurors voluntarily to *exempt* themselves from service?

The United States Supreme Court has never directly ruled on the first question, but *Strauder v. West Virginia*¹²⁰ contains a frequently quoted dictum on the subject. The issue in *Strauder* was whether a Negro could lawfully be tried under a statute limiting jury service to white male citizens. Holding the statute's racial classification to be in violation of the equal protection clause of the fourteenth amendment, the Court added:

We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it. . . . We are not now called upon to affirm or deny that it had other purposes.¹²¹

Since *Strauder*, the Court has decided three cases involving the exclusion of women from juries. In none of these, however, was the exclusion prescribed by state law. Two involved federal juries chosen at a time when the federal statute referred to state law for standards of jury eligibility. In *Ballard v. United States* the Court indicated that exclusion of females from the federal jury had been improper, since the state law involved there expressly qualified women for service.¹²² Speaking for four of the

¹¹⁹ Id. at 601, 31 S.E.2d at 871-72 (Seawell, J., dissenting). Another way to deal with the historical argument is to meet it on its own ground. In *Commonwealth v. Maxwell*, 271 Pa. 378, 114 A. 825 (1921), the court held that historically the most important feature of trial by jury had been that the legislature had the power to set jury qualifications.

¹²⁰ 100 U.S. 303 (1879).

¹²¹ Id. at 310.

¹²² 329 U.S. 187, 193-94 (1946). In the earlier case, *Glasser v. United States*, 315 U.S. 60 (1942), the Court had refused to find that an all-male federal grand jury had been improperly constituted. This holding, however, was based on the fact that only a very short period of time had elapsed between the enactment

five-man majority, Mr. Justice Douglas eloquently stated a case for inclusion of women on juries:

It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.¹²³

The third case, *Fay v. New York*,¹²⁴ involved a number of challenges to a New York "blue ribbon" grand jury, one of which alleged systematic discrimination against women in selecting the venire.¹²⁵ The Court affirmed the lower court's conclusion that appellant's evidence did not establish this contention, but went on to suggest that the exclusion of women from juries would not raise a serious constitutional question:

The first state to permit women jurors was Washington, and it did not do so until 1911. In 1942 only 28 states permitted women to serve on juries and they were still disqualified in the other 20. Moreover, in 15 of the 28 states which permitted women to serve,

of the Illinois statute qualifying women for jury service and the selection of the grand jury in question. *Id.* at 64-65. The Court's clear implication was that absent these circumstances, the exclusion of women from the jury list would have been error.

¹²³ 329 U.S. at 193-94 (1946).

¹²⁴ 332 U.S. 261 (1947).

¹²⁵ The defendants in *Fay* were male labor union officials who had been convicted of extorting payments from employers by threats of various kinds. Their principal ground of appeal was the asserted invalidity of the process by which the special "blue ribbon" jury panel was drawn, alleging that the process discriminated both against women and against laborers, craftsmen and service employees—the "working class" in general. The five-member majority's opinion appears to hold that the record on appeal justified a finding of no purposeful discrimination; it also declares that such discrimination, even if present, would not necessarily constitute a denial of equal protection to defendants. Mr. Justice Murphy's dissenting opinion does not touch on the issue of sex discrimination, and, in light of the nature of the defendants' activities, it seems likely that the allegations of economic and social discrimination were the main basis of defendants' argument.

they might claim exemption because of their sex. It would, in the light of this history, take something more than a judicial interpretation to spell out of the Constitution a command to set aside verdicts rendered by juries unleavened by feminine influence. The contention that women should be on the jury is not based on the Constitution, it is based on a changing view of the rights and responsibilities of women in our public life, which has progressed in all phases of life, including jury duty, but has achieved constitutional compulsion on the states only in the grant of the franchise by the Nineteenth Amendment. We may insist on their inclusion on federal juries where by state law they are eligible but woman jury service has not so become a part of the textual or customary law of the land that one convicted of crime must be set free by this Court if his state has lagged behind what we personally may regard as the most desirable practice in recognizing the rights and obligations of womanhood.¹²⁶

Although understandable in its reluctance to impose federal constitutional standards in an area historically within the states' competence to control, this dictum nevertheless calls to mind—in its total reliance on historical practice as justification for sex discrimination—the dissenter's observation in *State v. Emery* that attitudes can be more formidable than arguments.

A 1939 Florida opinion is also worthy of note on the exclusion issue. In *Hall v. State*,¹²⁷ a statute restricting jury service to males was challenged by a female defendant. Relying on the *Strauder* dictum, the court rejected her contention that the statute violated the fourteenth and fifteenth amendments. The court further concluded that the exclusion of women from the jury could not have prejudiced the defendant:

It is not contended that juries composed of men would be less fair to women defendants than would juries composed of women. Indeed, experience would lead to a contrary conclusion. The spirit of chivalry and of deep respect for the rights of the opposite sex, have not yet departed from the heads and hearts of the men of this country.¹²⁸

The court's facile assumption may be questioned in light of the fact that the defendant in this case was accused of having given perjured testimony against a male defendant in an earlier murder trial. She was convicted by the all-male jury and sentenced to life imprisonment.¹²⁹

¹²⁶ 332 U.S. at 289-90.

¹²⁷ 136 Fla. 644, 187 So. 392 (1939).

¹²⁸ Id. at 665, 187 So. at 401.

¹²⁹ The court's rationale is also called into question by the many cases throughout the country which have considered whether a particular defendant has standing to raise the issue of exclusion of women from the jury lists. A rule applied in many state courts, although apparently not favored in the federal

The first square holding that exclusion of women from juries violates the equal protection clause of the fourteenth amendment was *White v. Crook*,¹³⁰ a case involving the Alabama jury statute. Ignoring the *Strauder* dictum, the court expressed its conclusion as follows:

Women are allowed to serve on juries in the federal courts and in the courts of forty-seven states. Only in three—Alabama, Mississippi and South Carolina—are women completely excluded from jury service. The time must come when a state's complete exclusion of women from jury service is recognized as so arbitrary and unreasonable as to be unconstitutional. As to Alabama, we can see no reason for not recognizing that fact at the present time.¹³¹

Without questioning the soundness of the result, we might point out that the opinion relies on nose-counting as its means of determining the scope of fourteenth amendment guarantees; in this respect, it is open to the same criticism as *Fay v. New York*.

The State of Alabama did not appeal from the *White* decision, and all three statutes completely excluding women from jury service have since been repealed.¹³² Subsequent to *White*, and prior to its repeal, however, the Mississippi statute was upheld by the supreme court of that state.¹³³ The following paragraph is the only portion of the opinion in which any reason was advanced to justify exclusion:

The legislature has the right to exclude women so they may continue their service as mothers, wives, and homemakers, and also to protect them (in some areas, they are still upon a pedestal) from the filth, obscenity, and noxious atmosphere that so often pervades a courtroom during a jury trial.¹³⁴

With the demise of exclusionary state statutes, the issue raised in *White* might appear to be moot. Cases may well arise,

courts, is that only a female defendant has standing to raise the issue, on the theory that it is the female defendant whose interests are threatened by practices which operate to exclude women. For cases applying the majority rule, see, e.g., *Griffin v. State*, 183 Ga. 775, 190 S.E. 2 (1937); *McKinney v. State*, 3 Wyo. 719, 30 P. 293 (1892). Contra, *Walter v. State*, 208 Ind. 231, 195 N.E. 268 (1935). As to the federal courts, compare *United States v. Butera*, 420 F.2d 564, 567 n.2 (1st Cir. 1970), with *Woodruff v. Breazeale*, 291 F. Supp. 130 (W.D. Miss. 1967), *aff'd*, 401 F.2d 997 (5th Cir. 1968).

¹³⁰ 251 F. Supp. 401 (M.D. Ala. 1966) (3-judge court).

¹³¹ *Id.* at 409.

¹³² Ala. Code tit. 30, § 21 (Supp. 1969), amending Ala. Code tit. 30, § 21 (1958); Miss. Code Ann. § 1762 (Supp. 1970), amending Miss. Code Ann. § 1762 (1942); S.C. Code Ann. § 38-52 (Supp. 1970), amending S.C. Code Ann. § 38-52 (1962).

¹³³ *State v. Hall*, 187 So. 2d 861 (Miss.), appeal dismissed, 385 U.S. 98 (1966). See also *Philpot v. State*, 43 Ala. App. 326, 190 So. 2d 293 (1966).

¹³⁴ *State v. Hall*, 187 So. 2d 861, 863 (Miss. 1966).

however, in which relief is sought from various other exclusionary practices. For example, the Fifth Circuit Court of Appeals has recently ruled that, in light of Mississippi's new statute making women eligible for jury service, state officials have a duty not to discriminate by including only a token proportion of women on the jury list.¹³⁵

Now that statutory exclusion of females from juries is at least out of fashion, if not unconstitutional, primary attention is shifting from exclusion to exemption. Statutes in a number of jurisdictions permit women, though eligible for service, to exempt themselves solely on account of their sex. Such statutes have been consistently upheld against the claim that they unconstitutionally discriminate against female defendants¹³⁶ or against prospective male jurors.¹³⁷

Some exemption statutes give every female summoned for jury duty the privilege of excusing herself from service. In a few states, the statutes have gone even further, providing that no woman is to be placed on the jury list unless she has previously filed a statement of her willingness to be called for service. The rationale for the latter type of statute is that it avoids the inefficiency of summoning many women who would choose to claim their exemption if called.

In *Hoyt v. Florida*,¹³⁸ a statute of this latter type was upheld by the Supreme Court against an equal protection attack. Noting that eighteen states permitted an automatic exemption for women and that three of these implemented this policy by calling only those women who had previously volunteered, the Court found that there was a rational basis for Florida's system:

Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that

¹³⁵ *Ford v. White*, 430 F.2d 951, 955 (5th Cir. 1970). See also *United States v. Butera*, 420 F.2d 564 (1st Cir. 1970), holding that inclusion of a disproportionately small number of women on the master jury list raises an inference of purposeful discrimination. Occasionally, the intentional exclusion of women jurors from a particular case will be frankly admitted. E.g., *Abbott v. Mines*, 411 F.2d 353 (6th Cir. 1969) (trial judge had barred all women from jury empaneled to try malpractice action involving cancer of the penis); *State ex rel. Passer v. County Bd.*, 171 Minn. 177, 213 N.W. 545 (1927) (trial court had excluded females from panel when a number of "carnal knowledge" cases were pending).

¹³⁶ E.g., *State v. Bray*, 153 La. 103, 95 So. 417 (1923).

¹³⁷ E.g., *Leighton v. Goodman*, 311 F. Supp. 1181 (S.D.N.Y. 1970).

¹³⁸ 368 U.S. 57 (1961).

a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.¹³⁹

The appellant also contended that Florida's statute, as applied, was unconstitutionally discriminatory. She pointed out that, out of some 46,000 eligible women voters in her county, only 220 had volunteered for jury duty during the eight years women had been eligible for such service. "Beside the point," the Court responded; "[g]iven the reasonableness of the classification . . . the relative paucity of women jurors does not carry" any "constitutional consequence."¹⁴⁰ Given the fact—accepted by the Court—that the end product of the Florida system in defendant's county was a jury list of 10,000 persons, of which only ten—ten!—were women, it is apparent that the Florida system was the functional equivalent of total exclusion.¹⁴¹

As indicated above, the Court has never held that outright exclusion of women from juries is a violation of equal protection. For many years, however, the Court has consistently condemned racial exclusion in jury selection.¹⁴² The *Hoyt* opinion attempted to explain this seeming anomaly:

This case in no way resembles those involving race or color in which the circumstances shown were found by this Court to compel a conclusion of purposeful discriminatory exclusions from jury service There is present here neither the unfortunate atmosphere of ethnic or racial prejudices which underlay the situations depicted in those cases, nor the long course of discriminatory administrative practice which the statistical showing in each of them evinced.¹⁴³

The meaning of this passage is obscure. At best, it overlooks the obvious fact that statutes exempting women from jury service do reflect the historical male prejudice against female participation in activities outside the family circle. At worst, it can be read as *condoning* that prejudice by suggesting that, although racial and ethnic prejudice are "unfortunate," sex prejudice is not.

¹³⁹ *Id.* at 61-62.

¹⁴⁰ *Id.* at 65.

¹⁴¹ The idea that exclusion is the natural result of the women-volunteers-only type of exemption statute is also strongly suggested by the Louisiana cases. See *State v. Reese*, 250 La. 151, 171, 194 So. 2d 729, 737, cert. denied, 389 U.S. 996 (1967); *State v. Dreher*, 166 La. 924, 943, 118 So. 85, 92, cert. denied, 278 U.S. 641 (1928); *State v. Bray*, 153 La. 103, 106, 95 So. 417, 418 (1923). In each of these cases involving a female defendant there were apparently no women on the jury panel in the defendant's parish.

¹⁴² E.g., *Strauder v. West Virginia*, 100 U.S. 303 (1879). See generally, *Swain v. Alabama*, 380 U.S. 202, 204, 228-29 (1965).

¹⁴³ 368 U.S. at 68.

Notwithstanding *Hoyt's* susceptibility to such criticism, any judge thereafter facing a federal constitutional challenge to a similar exemption for women could simply cite that case as dispositive.¹⁴⁴ In two recent cases involving the New York jury statute, however, judges have seen fit to add further embellishment to the *Hoyt* rationale, thereby reflecting their own attitudes toward this type of sex discrimination.

In *Leighton v. Goodman*,¹⁴⁵ a male called for jury duty sought an injunction against the county clerk's enforcement of the summons. Plaintiff challenged the jury statute on equal protection grounds: that by providing automatic exemption for women—all women—it in effect discriminated against all males. Although acknowledging that “the time may very well be ripe” for the legislature to amend the statute, the district court nevertheless held the constitutional claim “patently insufficient as a matter of law.” Adhering to the “rational basis” test, the court suggested a justification for the exemption:

Granted that some women pursue business careers, the great majority constitute the heart of the home, where they are busily engaged in the 24-hour task of producing and rearing children, providing a home for the entire family, and performing the daily household work, all of which demands their full energies. Although some women now question this arrangement, the state legislature has permitted the exemption in order not to risk disruption of the basic family unit. Its action was far from arbitrary.¹⁴⁶

Even if the court's factual assumptions were correct,¹⁴⁷ the view of women here expressed is reminiscent of that expressed by Judge Turner nearly ninety years ago.

In *DeKosenko v. Brandt*,¹⁴⁸ plaintiff, a female tenant suing her landlord, also challenged the New York jury law on constitutional grounds, claiming that it would deprive her of a fair

¹⁴⁴ Before the Florida statute was amended in 1967, it was once more unsuccessfully challenged, this time on the ground that it operated unfairly to exclude *black* women from juries. *Scott v. State*, 207 So. 2d 493 (Fla.), cert. denied, 393 U.S. 884 (1968).

¹⁴⁵ 311 F. Supp. 1181 (S.D.N.Y. 1970).

¹⁴⁶ *Id.* at 1183.

¹⁴⁷ In 1965, 37% of all women of working age were in the labor force. Nearly 60% of these women were married, and over a third had children under 18 years of age. In families where all children were over six years old and the fathers were at home and working, 43% of the wives were employed. U.S. Dep't of Labor, Women's Bureau Bull. No. 240, 1965 Handbook on Women Workers 15, 21, 37, 42 (1965). Whether these figures show that the “great majority” of women spend a 24-hour day at home is debatable. They certainly do not support the proposition that the working woman represents an aberration, which seems to be the court's view.

¹⁴⁸ 63 Misc. 2d 895, 313 N.Y.S.2d 827 (Sup. Ct. 1970).

jury. Her claim was denied by the New York County Supreme Court in an opinion defective in so many different ways that no description here could possibly do it justice. As an inducement to the reader to see for himself, we present the final passage:

Plaintiff is in the wrong forum. Her lament should be addressed to the "Nineteenth Amendment State of Womanhood" which prefers cleaning and cooking, rearing of children and television soap operas, bridge and canasta, the beauty parlor and shopping, to becoming embroiled in plaintiff's problems with her landlord.¹⁴⁹

We offer the following translation: "Plaintiff cannot complain of the absence of women on her jury, because that results from the willingness of women to claim their exemption, not from the mere existence of the exemption itself." As the dissenting Florida judge in *Hoyt* remarked in his opinion:

[I]t seems to me that if the present restriction upon female jury service were constitutional, then we must hold that the legislature could validly require all women to serve but limit male service to volunteers and thus, in effect, create an all female jury system.¹⁵⁰

In such a situation, would an absence of *males* from the jury thereafter be ascribed to "the State of Manhood, which prefers golf, bowling and working for a living to becoming embroiled in another male's lawsuit"?

Despite the general judicial acquiescence, we submit that an automatic jury exemption for women should raise a serious equal protection question. We doubt that any statute would today be upheld which provided that all black persons (or, for that matter, all white persons) should have an automatic exemption from jury service.¹⁵¹ Is a blanket exemption for all females any more justifiable? Granted that many females have work or child

¹⁴⁹ *Id.* at 898, 313 N.Y.S.2d at 830. The *DeKosenko* opinion was written by a judge who had earlier exhibited insensitivity to the aspirations of women. See *Goldblatt v. Board of Educ.*, 52 Misc. 2d 238, 275 N.Y.S.2d 550 (Civ. Ct. 1966), *aff'd*, 57 Misc. 2d 1089, 294 N.Y.S.2d 272 (Sup. Ct. 1968) (holding a female teacher not entitled to benefit of differential salary payment during her period of jury service, though male teacher would be so entitled).

¹⁵⁰ *Hoyt v. State*, 119 So. 2d 691, 701-02 (Fla. 1960) (Hobson, J.), *aff'd*, 368 U.S. 57 (1961).

¹⁵¹ A Florida Supreme Court judge who dissented in the *Hoyt* case raised this point:

No one in this enlightened age would question the fact that if a limitation such as is placed upon women by our statute with reference to jury service were engrafted into our statutory law in regard to some of the so-called minority groups comprising our citizenry, it would be stricken down as violative of constitutional guarantees of due process and equal protection of the laws.

Id. at 700.

care responsibilities (or health disabilities) which might justify excusing them from service, it is difficult to imagine any excuse (except pregnancy, a condition hardly shared at any one time by even a majority of the women in America) which could not also be advanced by a man similarly situated.¹⁵² How then is it possible to maintain that an exemption for every woman—including even the childless, single woman, and the working wife or mother—is not an arbitrary discrimination when based solely on her sex? Such a scheme, we submit, is based—and court opinions right up to the present day support our contention—on an additional assumption: that women are delicate creatures to be encouraged to stay at home and be protected from the hard, cruel world—and incidentally, as long as they *are* at home, to do the cooking, cleaning, mending and ironing for those of us who do have the affairs of the world to attend to.

E. Public Education

Although the dominant form of public education in the United States today is obviously “coeducation” (both sexes taught in the same schools and usually in the same classes), a number of public institutions of higher learning are not coeducational. In recent years a few courts have been called upon to decide the validity of a state educational policy providing for separation of the sexes; overall, the results represent at best a limited recognition of the right to equal educational opportunity regardless of sex.

Two such cases have come before the Texas Court of Civil Appeals. In 1958, in *Heaton v. Bristol*,¹⁵³ female plaintiffs had sought to enter Texas A. & M., an all-male institution. Reversing the lower court, the appellate court held—despite uncontroverted findings by the trial court that Texas A. & M. offered several courses of study not available at any other public institution of higher learning in the state—that no constitutional right of the plaintiffs had been violated. First, it was not shown that plaintiffs desired to take any of the courses unique to that institution. Nor was the court impressed by plaintiffs’ argument that, by

¹⁵² There seems to be no reason why a jury statute could not simply provide an exemption for any individual (regardless of sex) having the personal responsibility of caring for a minor child. While most of the prospective jurors thus excused might still be women, the exemption would then be related to a relevant circumstance affecting particular individuals, and men coming within its provisions would be entitled to a similar exemption. Such a statute was upheld against constitutional challenge in *State v. Smith*, 102 N.J. Super. 325, 246 A.2d 35 (Super. Ct. 1968), *aff’d*, 55 N.J. 476, 262 A.2d 868, cert. denied, 400 U.S. 949 (1970).

¹⁵³ 317 S.W.2d 86 (Tex. Civ. App. 1958), cert. denied, 359 U.S. 230 (1959).

denying them the right to attend this particular institution, which was most near their homes and thus most convenient, the state had denied them equal protection. Finally, the court relied upon the existence of compulsory military training at Texas A. & M. as evidence of its unsuitability for females and pointed to the lack of any precedent upholding plaintiffs' position.

To determine whether there is unequal treatment of the sexes, the court stated, one must view the state's entire higher education system. The court concluded that the Texas system did make "ample and substantially equal provision for the education of both sexes."¹⁵⁴ In the court's view, the question was simply whether the state may constitutionally maintain, along with sixteen coeducational institutions, two which are not coeducational—one male, one female:

We think undoubtedly the answer is Yes. Such a plan exalts neither sex at the expense of the other, but to the contrary recognizes the equal rights of both sexes to the benefits of the best, most varied systems of higher education that the State can supply.¹⁵⁵

A similar action was brought two years later in *Allred v. Heaton*,¹⁵⁶ and in that case, at least one of the plaintiffs declared her desire to enroll in floriculture, one of the courses apparently not available at any other campus in the Texas university system. The court, possibly dubious of her good faith since she had once declared an intention to study law, held that, since the applicants (relying on the stated policy of exclusion) had not submitted applications for admission, they were precluded from relief. In affirming generally its earlier position with respect to sex-segregated education, the court indicated in dictum that should the plaintiff in fact apply for admission to study floriculture, she should not be excluded solely on the basis of her sex.¹⁵⁷ Upon rehearing, the college moved to strike that paragraph from the court's opinion, as constituting dictum. The court granted the motion without comment. This was not the only dictum in the opinion, however; consider the following:

Surely the Supreme Court of the United States will not attempt to interfere with the public policy of the sovereign states of this nation in the management and control of their respective education systems so long as such systems do not discriminate against color or race.¹⁵⁸

¹⁵⁴ Id. at 99.

¹⁵⁵ Id. at 100.

¹⁵⁶ 336 S.W.2d 251 (Tex. Civ. App.), cert. denied, 364 U.S. 517 (1960).

¹⁵⁷ Id. at 262-63.

¹⁵⁸ Id. at 261.

A far different view of the constitutional issues was expressed in *Kirstein v. Rector and Visitors of the University of Virginia*,¹⁵⁹ a 1970 decision involving the College of Arts and Sciences of the University of Virginia at Charlottesville. A three-judge federal district court held that refusal to admit women to the college was a denial of equal protection, since the college offered courses of instruction not found elsewhere in the state and because its degree had greater "prestige" than that of any other state college. The court did, however, deny plaintiffs' claim for relief, on the ground that a plan for implementing coeducation at the campus had already been adopted. The court expressly declined to decide whether it was impermissible for the state to operate *any* institution of higher learning restricted to one sex, on the ground that plaintiffs lacked standing to raise the issue. The court was also careful to skirt—in a footnote—the question of whether the ghost of *Plessy v. Ferguson*¹⁶⁰ still walks: "We need not decide on the facts of this case whether the now discountenanced principle of "separate but equal" may have lingering validity in another area—for the facilities elsewhere are not equal with respect to these plaintiffs."¹⁶¹

The most recent case to call into question a state's operation of sex-segregated educational facilities is *Williams v. McNair*,¹⁶² a suit in which several males sought to enjoin South Carolina's operation of Winthrop College on a for-girls-only basis. South Carolina maintains a substantial number of university-level institutions, only two of which are segregated by sex—Winthrop and the Citadel, an all-male military academy. The court denied relief, noting that there is a respectable body of opinion which supports single-sex education on the ground that an educational

¹⁵⁹ 309 F. Supp. 184 (E.D. Va. 1970).

¹⁶⁰ 163 U.S. at 537 (1866).

¹⁶¹ 309 F. Supp. at 187 n.1. There is one other recent case involving a state university in which sex discrimination was successfully challenged on equal protection grounds. In *Mollere v. Southeastern La. College*, 304 F. Supp. 826 (E.D. La. 1969), female plaintiffs complained of a rule which required all female students under the age of 21 (regardless of their year) to live in college dormitories while subjecting only *freshman* men to the same requirement. The court held the rule to be a violation of equal protection, but the significance of its opinion is unclear in light of the conceded fact that the rule's sole purpose was to insure adequate income from dormitory fees; there was apparently no argument that the policy was based in any respect on any differences between men and women. The opinion is an interesting example of one court's application of the equality principle in a sex-discrimination case, however, particularly in its use of a race-discrimination analogy to make a point about arbitrary treatment. *Id.* at 827 n.1.

¹⁶² 316 F. Supp. 134 (D.S.C. 1970), *aff'd mem.*, 401 U.S. 951 (1971) (Justice Harlan dissenting on the issue of whether direct appeal to the Supreme Court was available).

institution can advance its effectiveness by concentrating on "areas of primary interest to only one sex." In the court's view, this was sufficient to demonstrate that the state's discrimination was not "wholly wanting in reason."¹⁶³ The court did not go so far as to suggest that the state could maintain all its educational institutions on a sex-segregated basis, but it did declare that on the facts presented, where there were coeducational institutions available to every student in the state, equal protection had not been denied. The *Kirstein* case was distinguished with ease on the ground that the court there had specifically found that equal facilities were not available to women elsewhere in the state university system. The *Williams* decision has recently been affirmed without opinion by the United States Supreme Court.

The district court in *Williams* was careful to avoid the kind of overt sexist rhetoric that has marred court opinions in many sex-discrimination cases, and at first blush the decision seems not only predictable but reasonable in light of the general availability of quality coeducation in the state. But closer examination may be in order. The statute establishing Winthrop College described its curriculum as follows: "such education as shall fit them [young women] for teaching" and also "stenography, typewriting, telegraphy, bookkeeping, drawing (freehand, mechanical, architectural, etc.), designing, engraving, sewing, dress-making, millinery, art, needlework, cooking, housekeeping and such other industrial arts as may be suitable to their sex and conducive to their support and usefulness," together with such other subjects "as the progress of the times may require."¹⁶⁴ To evaluate this case, it may be useful to return to the racial analogy:

1) May the state properly operate only one college, for whites only? Clearly not. Could it operate only one, and only for men? The *Williams* opinion concedes that it could not.

2) Could it operate only two colleges, one for whites and one for blacks? Again, clearly not. Could it operate only two colleges, one for women and one for men? The *Williams* opinion is silent. In view of the long history of male dominance, we suggest that the adoption of such a scheme by a male-dominated legislature would at least raise a constitutional question. If accompanied by different curricula, clearly reflecting stereotypical attitudes about sex roles, a strong inference would arise that the scheme reflected an assumption that women are inherently in-

¹⁶³ *Id.* at 137.

¹⁶⁴ *Id.* at 136 n.3.

capable of education on an equal basis with men—just as clearly as the race-segregated schools of the South indicated a similar belief about the races.

3) Can the state operate separate schools for the races, so long as it maintains at least some school where the races *are* mixed? Any plan where the white citizens of a state were given the option of education in black-free state colleges would seem in clear violation of the school segregation decisions,¹⁶⁵ *whether or not* any integrated schools were also available. Should the same result follow in a sex-segregation case?

To the *Williams* court and apparently to the Supreme Court as well, the answer is clear: no violation here. But consider the facts of *Williams*: In addition to its coeducational colleges, South Carolina operates two sex-segregated institutions—Winthrop, a school apparently designed to produce secretaries and homemakers, and the Citadel, a military school offering a full range of liberal arts and engineering degrees. To pursue the race analogy a bit further, suppose that South Carolina, in addition to operating one or more racially mixed institutions, should maintain two other colleges. One, Dred Scott Institute, would offer degrees in agriculture, music, dance and physical education; it would accept only black students. The other, Calhoun College, would offer degrees in nuclear physics, medicine, law, engineering and business administration; only whites need apply. Even assuming that all of these studies were available at a biracial institution in the state, would such a scheme survive constitutional scrutiny?

It is difficult to see how; indeed, any other answer is unthinkable. And yet, the maintenance of two institutions for the sexes in South Carolina, one for male warriors and the other for female domestics, is different only in that the assumptions it reflects about individual capabilities and aspirations are more widely shared. The role of a housewife or a secretary is an honorable and productive one; so of course is the role of a champion athlete or a tenant farmer. To attack the attitudes reflected in the *Williams* decision is not to denigrate the individuals for whom such stereotypes happen to be accurate; it is to attack the arrogant assumption that merely because these stereotypes are accurate for some individuals, the state has a right to apply them to all individuals—and, indeed, to shape its

¹⁶⁵ See *Green v. County School Bd.*, 391 U.S. 430 (1968); *Goss v. Board of Educ.*, 373 U.S. 683 (1963).

official policy toward the end that they shall *continue* to be accurate for all individuals.

F. Criminal Sentencing

State statutes prescribing the term of imprisonment for various crimes sometimes distinguish between offenders on the basis of sex. In some cases, the statute permits the sentencing judge to set a fixed term (within a stated range) for an offender of one sex, while requiring an indeterminate sentence for an offender of the other.

In *State v. Heitman*,¹⁶⁶ a Kansas statute provided that a female over eighteen should be sentenced to confinement for an indeterminate term of no more than the maximum sentence fixed by law for her offense. The female defendant had been convicted of a misdemeanor punishable by thirty days to six months imprisonment and was accordingly sentenced to an indeterminate term of six months. She appealed on equal protection grounds: Had she been a man, the judge in his discretion could have sentenced her to a fixed term of less than six months. The trial court's action was affirmed. Although recognizing the principle that "no different or higher punishment shall be imposed on one than that which is prescribed for all, for the same offense,"¹⁶⁷ the Kansas Supreme Court concluded that sufficient differences exist between men and women to justify classification by sex in the correction and rehabilitation of criminals:

It required no anatomist, or physiologist, or psychologist, or psychiatrist to tell the Legislature that women are different from men. In structure and function human beings are still as they were in the beginning. "Male and female created He them." It is a patent and deep-lying fact that these fundamental anatomical and physiological differences affect the whole psychic organization. They create the differences in personality between men and women, and personality is the predominating factor in delinquent careers. It was inevitable that, in the ages during which woman has been bearer of the race, her unique and absolutely personal experiences, from the time of conception to the time when developed offspring attains maturity, should react on personality, and produce what we understand to be embraced by the term "womanhood." Woman enters spheres of sensation, perception, emotion, desire, knowledge, and experience, of an intensity and of a kind which man cannot know. Her individualities and peculiarities are fostered by education and by social custom—whether false and artificial or not is of no consequence here; and the result is a feminine type radically different from the masculine type, which

¹⁶⁶ 105 Kan. 139, 181 P. 630 (1919).

¹⁶⁷ *Id.* at 140-41, 181 P. at 631.

demands special consideration in the study and treatment of non-conformity to law.¹⁶⁸

It is sadly ironic that the court's opinion was largely devoted to praise of indeterminate sentencing as an example of the scientific foundation and humane approach of "the new penology." In retrospect, the court's touching faith in the rehabilitative capabilities of prisons seems naive at best.

Statutes of this sort apparently were not successfully challenged until 1968.¹⁶⁹ In that year several courts, both state and federal, concluded that such discrimination violated equal protection. The first such case was *United States ex rel. Robinson v. York*,¹⁷⁰ a federal habeas corpus proceeding. In this case, the effect of the Connecticut statute was to require an indeterminate (maximum three years) sentence for petitioner, even though a male convicted of the same offense would receive at most a total sentence of eighteen months. In addition to the disparity between fixed and indeterminate sentences, the case thus raised an issue not presented in *Heitman*: a longer maximum sentence for the female. Citing *Loving v. Virginia*¹⁷¹ for the proposition that equal protection requires any racial classification to be subjected to the "most rigid scrutiny," the *Robinson* court held that sex discrimination should bear the same heavy burden of justification:

While the Supreme Court has not explicitly determined whether equal protection rights of women should be tested by this rigid standard, it is difficult to find any reason why adult women, as one of the specific groups that compose humanity, should have a lesser measure of protection than a racial group.¹⁷²

Tested by this standard, the statute was found wanting. Suggesting that imprisonment is still imprisonment, whatever euphemisms may be employed to describe it, the court was unable to discern any reason sufficient to justify the difference in treatment:

It may be granted that a broad discretion should be given to the courts in order that the punishment imposed should bear a proper relation to the enormity of the offense. But the circumstances which may affect the sentences must be circumstances connected with the crime. That there are differences between men and women cannot be denied, but that these differences justify a longer imprisonment of women cannot be sustained. There is no connection

¹⁶⁸ Id. at 146-47, 181 P. at 633-34.

¹⁶⁹ See, e.g., *Ex parte Gosselin*, 141 Me. 412, 44 A.2d 882 (1945), appeal dismissed sub nom. *Gosselin v. Kelly*, 328 U.S. 817 (1946); *Ex parte Brady*, 116 Ohio St. 512, 157 N.E. 69 (1927).

¹⁷⁰ 281 F. Supp. 8 (D. Conn. 1968).

¹⁷¹ 388 U.S. 1 (1967) (invalidating Virginia's antimiscegenation statute).

¹⁷² 281 F. Supp. at 14.

whatsoever between a breach of peace or resistance to arrest and being a woman. Those misdemeanors may be committed by persons of either sex.¹⁷³

The principle announced in *Robinson* has since been applied in two other Connecticut cases: once again in a federal district court,¹⁷⁴ and once in the Superior Court of Connecticut.¹⁷⁵

In *Commonwealth v. Daniel*,¹⁷⁶ the Pennsylvania Supreme Court reached a similar result. The statute in that case did not prescribe for women a sentence longer than the maximum for men, but, like the Kansas statute attacked in *Heitman*, it did deprive the court of the power to impose upon females a fixed sentence shorter than the statutory maximum. The *Daniel* opinion fell short of articulating the "rigid scrutiny" test employed in *Robinson*; on the contrary, it stated that a "strong presumption of Constitutionality"¹⁷⁷ attaches to every statute. Nevertheless, the court concluded:

[W]e fail to discern any reasonable and justifiable differences . . . between men and women which would justify a man being *eligible* for a shorter maximum prison sentence than a woman for the commission of the same crime, especially if there is no material difference in their records and the relevant circumstances.¹⁷⁸

This opinion supports our contention that not only are many forms of sex discrimination vulnerable when subjected to "rigid scrutiny," but they cannot even survive a serious application of the "rational basis" test.¹⁷⁹

¹⁷³ *Id.* at 16.

¹⁷⁴ *United States ex rel. Sumrell v. York*, 288 F. Supp. 955 (D. Conn. 1968).

¹⁷⁵ *Liberti v. York*, 28 Conn. Supp. 9, 246 A.2d 106 (Super. Ct. 1968).

¹⁷⁶ 430 Pa. 642, 243 A.2d 400 (1968).

¹⁷⁷ *Id.* at 650, 243 A.2d at 404.

¹⁷⁸ *Id.*

¹⁷⁹ The principle of the *Daniel* case has also been applied in Pennsylvania to the issue of where the defendant will be imprisoned. In *Commonwealth v. Stauffer*, 214 Pa. Super. 113, 251 A.2d 718 (1969), the defendant had been sentenced to a state penitentiary for women. On appeal, she was ordered returned to the county jail, it being conceded that any man convicted of the same offense would be confined in a county institution. The opinion nowhere suggests that separate imprisonment of men and women is constitutionally suspect; it does, however, suggest that the type of confinement must be substantially the same for both sexes.

Another recent Pennsylvania case involved still a different type of sex discrimination. In *In re Williams*, 210 Pa. Super. 388, 234 A.2d 37 (1967), *aff'd* sub nom. *In re Jones*, 432 Pa. 44, 246 A.2d 356 (1968), the commitment of two youthful males to a correctional institution as "defective delinquent juveniles" was challenged on the ground that the stated procedure was applicable only to males. The Superior Court held the constitutional challenge to be without merit, supporting its holding largely by quotations from its opinion in the *Daniel* case, 210 Pa. Super. 156, 232 A.2d 247 (1967), later reversed by the Pennsylvania Supreme Court. The issue of unconstitutional sex discrimination was apparently

In light of the consistent holdings in these recent cases, *Wark v. State*¹⁸⁰ is a disagreeable surprise. For escaping from a Maine prison farm, the defendant had been sentenced to an additional term of six to twelve years. He contended (and the Supreme Judicial Court of Maine assumed) that a female convicted of escaping from the women's reformatory would have been subject to a maximum sentence of no more than eleven months. Appellant therefore argued that his sentence constituted a denial of equal protection. The court distinguished the recent sentencing cases on the ground that they involved sex discrimination justified only by considerations of rehabilitation and "reform." Maine's statute, said the court, was enacted for a different reason: deterrence of a particular offense. With respect to escape, the court felt, the "distinctive attributes of the sexes" were both "relevant" and "controlling".¹⁸¹

The Legislature could on the basis of long experience conclude that women, even those sentenced to the State Prison for serious offenses, tend for the most part to be more amenable to discipline and custodial regulation than their male counterparts and can therefore be effectively confined in an institution which lacks the high walls, armed guards and security precautions of a prison. By the same token the Legislature could reasonably conclude that the greater physical strength, aggressiveness and disposition toward violent action so frequently displayed by a male prisoner bent on escape from a maximum security institution presents a far greater risk of harm to prison guards and personnel and to the public than is the case when escape is undertaken by a woman confined in an institution designed primarily for reform and rehabilitation. Viewing statutory provisions for punishment as in part a deterrent to criminal conduct, the Legislature could logically and reasonably conclude that a more severe penalty should be

not argued on appeal. Cf. *Chambers v. Director*, 244 Md. 697, 223 A.2d 774 (1966) (dictum that limiting a state procedure for the treatment of "defective delinquents" to males is not unconstitutional). But see *Morgan v. State*, 179 Ind. 300, 101 N.E. 6 (1913) (holding unconstitutional a state statute providing for the commitment to an institution for "insane criminals" of any male defendant acquitted of a felony charge solely by reason of insanity).

The Pennsylvania Supreme Court has also indicated a willingness to extend the principle of the *Daniel* case to invalidate sentences meted out to juvenile offenders that are longer than those imposed on adults for identical offenses. In *re Wilson*, 438 Pa. 405, 430-32, 264 A.2d 614, 617-18 (1970). At least one other court has rejected this approach, in the absence of a showing by the accused that the state's juvenile correction system is devoid of rehabilitative aspects beyond those of mere confinement and discipline. *Smith v. State*, 444 S.W.2d 941, 948 (Tex. Civ. App. 1969). See also the cases cited in Comment, 82 Harv. L. Rev. 921, 925-26 n.25 (1969). On the general topic of sentencing, see Rubin, Disparity and Equality of Sentences: A Constitutional Challenge, 40 F.R.D. 55 (1967).

¹⁸⁰ 266 A.2d 62 (Me.), cert. denied, 400 U.S. 952 (1970).

¹⁸¹ Id. at 64.

imposed upon a male prisoner escaping from the State Prison than upon a woman confined at the 'Reformatory' while serving a State Prison sentence who escapes from that institution. We conclude that a classification based on sex under these circumstances is neither arbitrary nor unreasonable but is a proper exercise of legislative discretion which in no way violates the constitutional right to equal protection of the law.¹⁸²

One indication of the tenacity of sex stereotyping is the fact that an opinion like that in *Wark* will so often seem sensible on first reading—at least to a male reader. After all, men *are* bigger and stronger on the average than women; if we were prison guards, we would probably be more afraid of an escaping male prisoner than a female. Isn't the court's reasoning therefore correct?

The trouble with the court's approach is that, in its preoccupation with group characteristics, it ignores the fact that the law punishes *individuals*. Again, the best way to illustrate the defect in this approach may be by analogy. For instance, suppose it could be demonstrated that persons of one race do commit a particular crime more frequently (in proportion to their numbers) than persons of other races. Could the state constitutionally prescribe a higher sentence for persons of that race who commit that crime, on the sole ground that this would constitute a greater deterrent to those who most need to be deterred? The answer—even if one did not agree with it—is clear. Can similar sex discrimination be any more justifiable?

Of course, it might be argued that the *Wark* court was speaking not only of propensity to commit the crime, but also of ability to commit it. Men are, by and large, bigger and stronger than women; not only may they be more likely to try to escape, they could be more likely to succeed. Is it not then proper for the state to consider this factor in fashioning a sentencing statute aimed at deterrence?

Since it is awkward to pursue a racial analogy at this point (it being virtually impossible for the writers to imagine any crime which members of one race have more ability to commit),¹⁸³ let us use another physical characteristic which, like sex and race, is not the result of individual choice: the ability to see. It seems perfectly plausible to assume that sighted persons are more capable than blind persons of committing virtually

¹⁸² *Id.* at 65.

¹⁸³ For one hypothetical example, see the suggestion by Professor Graham Hughes in *The Right to Special Treatment*, in *The Rights of Americans* 102 (N. Dorsen ed. 1971).

any crime. Would a statute be valid which provided that for any blind adult convicted of a felony, the penalty should be reduced by one-half?

If such a statute would be held to violate equal protection, the statute in *Wark* should clearly fare no better. Even if the hypothetical statute could be upheld, however, the *Wark* statute is still deficient by comparison. It distinguishes between defendants not on the basis of their *individual* characteristics, but solely on the basis of the extent to which two groups differ in *average* size and strength—differences which may not at all apply to particular individuals within either group.

In support of the *Wark* result, it might further be argued that men may properly be confined in separate institutions, made more "escape-proof" than those for women. This point may be well-taken;¹⁸⁴ even so, it does not necessarily follow that a higher sentence is in order for the crime of escape by a male, since, as the *Wark* court recognized, the sentence is properly to be regarded as "punishment," even though it may have a deterrent effect. It might well be argued that a defendant cannot properly be punished in part simply for being a male. Nor, even if all males *were* bigger, stronger and more aggressive than all females, is the statute necessarily justifiable by analogy to criminal statutes which punish an offense more harshly when accompanied by a greater threat of harm, *e.g.*, "armed robbery." In those cases, the offender may be influenced in his choice of weapons by the varying punishments held out. The male does not choose his sex, however; in our view, he therefore cannot appropriately be punished for it.

G. Consortium

The concept of "consortium" combines two disparate elements: (1) companionship and affection (including sexual relations) between spouses, and (2) the right of one spouse to the services of the other spouse.¹⁸⁵ It will come as no surprise to the reader that originally both of these elements were obligations owed by wives to their husbands, but not vice versa. The underlying assumptions about sex roles are by now all too familiar:

¹⁸⁴ Some doubt may be cast on this proposition, however, by a decision such as *Commonwealth v. Stauffer*, 214 Pa. Super. 113, 251 A.2d 718 (1969). See note 179 *supra*. *Stauffer* can be distinguished, however, on the ground that in that case it was a *female* defendant who was being treated as the greater risk.

¹⁸⁵ See Lippman, *The Breakdown of Consortium*, 30 Colum. L. Rev. 651 (1930).

But the right of consortium was by no means fully expressed [at common law] in the terms of society, companionship, and conjugal affection. The right to service was a prominent factor in it, and in respect to certain kinds of injuries, without doubt, the predominant factor. If we go back to the times when it took on its meaning the conditions were that the wife was socially and legally regarded as the husband's inferior, as having her existence merged into that of her husband, and as owing to him the duty, which he was entitled to command, of serving and administering to him in all the relations of domestic life. Her emancipation of recent years was centuries in the future. She was looked upon as the servant of and ministrant to her liege lord, to whom and to whose interests she was, by virtue of her marriage vow, devoted. He was entitled to her services, and these she was expected to render in the care of his home, in the rearing of his children, and in attending upon his wants.¹⁸⁶

Since wifely services could easily be equated with those of any servant, legal liability for interference with the master-servant relationship was easily extended to cases of injury to the husband-wife relationship.¹⁸⁷ Eventually, loss of consortium became recognized as a material element of damage in four types of actions by husbands against third parties: (1) criminal conversation, (2) alienation of affection, (3) malicious interference with the marital relationship and (4) negligent personal injury to the wife, resulting in loss of her services.

While corresponding recovery was available to wives in actions of the first three types, it was not in the fourth. Four primary reasons were advanced to justify this dichotomy.¹⁸⁸ By 1950, courts in at least eighteen jurisdictions had accepted these arguments,¹⁸⁹ with no clear holdings to the contrary.¹⁹⁰ Notwithstanding this overwhelming support for the no-recovery rule, each of the four assigned justifications is questionable.

The first is that a wife had no common law right to maintain an action in her own name. This argument is of little or no weight now that such disabilities have been removed; at any rate, it hardly justifies denial of a cause of action for only one of the four types of injury to the marital relationship.

¹⁸⁶ *Marri v. Stamford St. R.R.*, 84 Conn. 9, 12, 78 A. 582, 583 (1911).

¹⁸⁷ Lippman, *supra* note 185, at 652-53.

¹⁸⁸ For a good short discussion of these rationales, see Note, *Equal Protection: The Wife's Action For Loss of Consortium*, 54 Iowa L. Rev. 510, 517-21 (1968). For a trenchant criticism of the rule barring recovery by wives, see Foster, *Relational Interests of the Family*, 1962 U. Ill. L.F. 493, 520.

¹⁸⁹ See cases cited in *Hittafar v. Argonne Co.*, 183 F.2d 811, 812-13 n.5 (D.C. Cir.), cert. denied, 340 U.S. 852 (1950).

¹⁹⁰ To the extent that *Hipp v. E.I. Dupont*, 182 N.C. 9, 108 S.E. 318 (1921) was not in accord, it was overruled by *Hinnant v. Tidewater Power Co.*, 189 N.C. 120, 127-29, 126 S.E. 307, 311-12 (1925).

The second argument is that, in the first three types of action, the wife's injury is "direct," but in the fourth it is merely "consequential." Even if this distinction does have some validity, however, it affords no apparent justification for applying this limitation to wives but not to husbands.

A third rationale advanced in favor of the no-recovery rule is that a wife has no right to the services of her husband, as contrasted with his companionship, affection, etc. This argument depends on the premise that the only element of recovery in the wife's consortium action would be loss of services. This premise appears unjustified, however, since the husband's recovery for loss of consortium has always included damages for loss of conjugal relations as well as loss of services.¹⁹¹ Moreover, even if loss of services *were* the only element of recovery, the wife might nevertheless be entitled to a cause of action by virtue of the Married Women's Acts. These acts removed many disabilities formerly imposed upon married women, and they could have been interpreted as giving the wife a reciprocal right to her husband's services. But they were not.¹⁹²

The fourth reason for denying the wife's recovery for loss of consortium is that the husband in his own action against the tortfeasor can recover for impairment of his ability to provide support. Permitting the wife to sue the same defendant for loss of her husband's services would therefore result in double recovery. Since husbands do have a duty to support their wives, it must be conceded that this rationale has some validity, and recent opinions have treated it as the determinative issue in evaluating the no-recovery rule.

The leading authority for rejection of the no-recovery rule on nonconstitutional grounds is *Hitafter v. Argonne Co.*¹⁹³ In this case of first impression, the court carefully considered the principal justifications for the rule, and found each of them insufficient. The court answered the double recovery argument by asserting that it would be a simple matter to deduct from the wife's damages any amount recoverable by the husband for impairment of support.¹⁹⁴ Rejecting the unbroken succession of contrary precedent in other jurisdictions as based on "specious

¹⁹¹ See Lippman, *supra* note 185, at 665-69.

¹⁹² In a few jurisdictions, the Married Women's Act was held to deprive the husband of his cause of action for loss of consortium, forcing him to share the wife's disability. See, e.g., *Marri v. Stamford St. R.R.*, 84 Conn. 9, 78 A. 582 (1911); *Bolger v. Boston Elevated Ry.*, 205 Mass. 420, 91 N.E. 389 (1910); *Helmstetler v. Duke Power Co.*, 224 N.C. 821, 32 S.E.2d 611 (1945).

¹⁹³ 183 F.2d 811 (D.C. Cir.), cert. denied, 340 U.S. 852 (1950).

¹⁹⁴ *Id.* at 819.

and fallacious reasoning," the court then adopted for the District of Columbia a rule allowing the wife to recover.¹⁹⁵

In the twenty-one years since *Hitafer*, a number of courts have been called upon to reconsider the wisdom of continued adherence to the no-recovery rule. Although the decisions have been divided, *Hitafer* has attracted a considerable following.¹⁹⁶ Indeed, very recent cases indicate a clear trend in favor of permitting recovery.¹⁹⁷ In this area at least, the courts appear to be awakening to the fact that rules of law based upon outmoded concepts of uxorial status do not deserve contemporary reaffirmation.

In jurisdictions where the courts have refused to abandon the no-recovery rule, it is not surprising that equal protection claims have been raised. In two recent diversity cases, federal district courts in Michigan and Illinois were required to apply Indiana law in determining whether a wife could recover for loss of consortium. Since Indiana precedent at the time was clearly against recovery,¹⁹⁸ the only question was whether such a rule contravened the fourteenth amendment. In one case,¹⁹⁹ the opinion simply announced the court's conclusion that the Indiana rule violated equal protection. In *Karczewski v. Baltimore & Ohio Railroad*,²⁰⁰ however, a similar conclusion was reached only after a carefully stated analysis of the problem. After reviewing the standard arguments against recovery, the court rejected them as unconvincing:

¹⁹⁵ The *Hitafer* case involved two different issues: whether a wife can recover for loss of consortium as a matter of general law, and whether the workmen's compensation statute for the District of Columbia permitted any recovery for loss of consortium. The court answered both questions affirmatively. In *Smither & Co. v. Coles*, 242 F.2d 220 (D.C. Cir.), cert. denied, 354 U.S. 914 (1957), *Hitafer* was overruled on the second issue. It was reaffirmed on the first issue, however, in *Rollins v. District of Columbia*, 265 F.2d 347 (D.C. Cir. 1959).

¹⁹⁶ See W. Prosser, *Torts* § 119 (3d ed. 1964); *Restatement (Second) of Torts* § 695, at 13-21 (Tent. Draft No. 14, 1969); *Annot.*, 23 A.L.R.2d 1378 (1952).

¹⁹⁷ Three recent decisions following *Hitafer* and overruling contrary precedent are *Troue v. Marker*, 252 N.E.2d 800 (Ind. 1969); *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968); and *Clouston v. Remlinger Oldsmobile Cadillac, Inc.*, 22 Ohio St. 2d 65, 258 N.E.2d 230 (1970). Pennsylvania reaffirmed its adherence to the no-recovery rule by a 5-2 margin in *Brown v. Glenside Lumber & Coal Co.*, 429 Pa. 601, 240 A.2d 822 (1968).

¹⁹⁸ *Burk v. Anderson*, 232 Ind. 77, 109 N.E.2d 407 (1952); *Boden v. Del-Mar Garage*, 205 Ind. 59, 185 N.E. 860 (1933); *Miller v. Sparks*, 136 Ind. App. 148, 189 N.E.2d 720 (1963). All three were expressly overruled in *Troue v. Marker*, 252 N.E.2d 800, 806 (Ind. 1969).

¹⁹⁹ *Owen v. Illinois Baking Corp.*, 260 F. Supp. 820 (W.D. Mich. 1966).

²⁰⁰ 274 F. Supp. 169 (N.D. Ill. 1967).

[T]hat women cannot sue for loss of consortium is not excusable because based upon an historical legal doctrine which viewed a woman as her husband's chattel or "servant." Some positive justification is required. Nothing persuasive is offered by any of the cases which deny her this right.

Marriage is no longer viewed as a "master-servant" relationship. It has assumed a special status in which each party has equal rights under the law.²⁰¹

Concluding that there was in fact no rational basis for the no-recovery rule, the court then held it to be a violation of equal protection.²⁰²

Slightly more than a year later, however, *Karczewski* was in effect overruled by the Seventh Circuit Court of Appeals in *Miskunas v. Union Carbide Corp.*²⁰³ In that case, the Indiana no-recovery rule was again contested on equal protection grounds. The only rational basis that the court could discover for the Indiana rule was the avoidance of double recovery. But that, it felt, was sufficient:

Because a husband can recover for lost earnings, Indiana could reasonably conclude that it would be undesirable to give the wife an action that might permit double recovery. Since 87.8% of married men are employed and only 34.4% of wives are employed, Indiana could justifiably discriminate in this respect between the spouses. Indiana could infer that more often in a wife's suit than a husband's, the jury would award her duplicating damages for some of the same elements of injury.²⁰⁴

At first glance, the employment statistics relied upon by the court seem to support its conclusion that there is a rational basis for the no-recovery rule, since they do demonstrate that the great majority of actions by wives will involve the possibility of double recovery. On closer examination, however, the figures reveal that, for 12% of the wives, an action for loss of consortium could not possibly result in double recovery. The arbitrariness of the no-recovery rule is demonstrated by the unfairness of its application to these wives. If the double-recovery problem is sufficiently acute to warrant an exclusionary rule at all, using the plaintiff's sex as the basis for exclusion seems questionable.

²⁰¹ *Id.* at 175.

²⁰² *Contra*, *Krohn v. Richardson-Merrell, Inc.*, 219 Tenn. 37, 406 S.W.2d 166 (1966), cert. denied, 386 U.S. 970 (1967); *Seagraves v. Legg*, 147 W. Va. 331, 127 S.E.2d 605 (1962).

²⁰³ 399 F.2d 847 (7th Cir. 1968), cert. denied, 393 U.S. 1066 (1969). At the time of the *Miskunas* decision, both Illinois and Wisconsin had followed *Hitafer*. Subsequently, Indiana did also. *Troue v. Marker*, 252 N.E.2d 800 (Ind. 1969). The equal protection issue now appears moot in the Seventh Circuit, except as to causes of action arising prior to the changes in state law.

²⁰⁴ 399 F.2d at 850.

It would be much fairer (and would impose no special burden on the courts) to entertain the wife's cause of action at least in every case where the husband was unemployed at the time of injury.

The consortium cases reflect a variety of ways in which sexist patterns of thought retain their influence over rules of law. In its inception, the rule granting only the husband an action for loss of consortium was blatantly male-supremacist: At common law, wives could be analogized to servants; a husband could therefore claim the benefit of the established cause of action for loss of the services of a negligently injured servant. Today, of course, no court could seriously declare that a husband is the "master" of his wife and that he is entitled to her services, companionship and sexual attentions without incurring any reciprocal obligations. Where the no-recovery rule survives, its principal justification is now the fear of double recovery—seemingly more a rationalization than a reason.

Although not stressed in judicial opinions, there may be another reason why the no-recovery rule is still adhered to. There is ample evidence that American courts have been reluctant to extend tort liability for purely "emotional" injury—largely because of their apprehension that indulgent juries will award excessive damages, given the intangible nature of such an injury and the ease with which it can be feigned. Thus, negligent infliction of mental suffering has only recently received wide recognition as a compensable wrong.²⁰⁵ The principal element in a wife's consortium recovery is apt to be the loss of her husband's companionship and affection; it would hardly be surprising if many courts regard this as an essentially "psychological" injury, requiring similar caution.

If this hypothesis is valid, then judicial retention of the no-recovery rule is understandable, but hardly commendable. Even if the fear of unjustified recoveries does furnish sufficient reason for a rule of exclusion, it surely does not require the perpetuation of irrational distinctions based on sex alone. Whatever the rule, it should be the same for both sexes; both should be permitted to recover, or neither.

H. Conclusions from the cases

Although the above cases deal with sex discrimination in a wide variety of activities, they by no means exhaust the examples which might be shown. We believe they are sufficient, however, to demonstrate the following general propositions:

²⁰⁵ See generally W. Prosser, *Torts* § 55 (3d ed. 1964).

(1) Despite the enactment of various laws designed to improve the position of women, male-dominated legislatures and courts have historically exhibited the belief that women generally are—and ought to be—confined to the social roles of homemaker, wife and mother, and gainfully employed (if at all) only in endeavors which comport with their assumed subservient, child-oriented and decorative characteristics;

(2) A small but significant number of courts has recently perceived that some legislation mandating sex discrimination presents substantial constitutional questions, and several such laws have been struck down on equal protection grounds;

(3) Despite such holdings by a number of state and lower federal courts, opinions continue to appear in which both the result and the reasoning are virtually indistinguishable from those issued nearly a century ago. In the absence of a definite shift of position on the part of the Supreme Court, and in the face of continued adherence by many state and federal courts to traditional sexist attitudes, it is far too soon to assert that a clear trend toward judicial recognition of women's rights has developed.²⁰⁸

²⁰⁸ The Supreme Court has never squarely held that any form of sex discrimination violates the equal protection guarantee. Moreover, as recently as the spring of 1971, in *Williams v. McNair*, 401 U.S. 951 (1971), the Court summarily affirmed a decision upholding South Carolina's operation of a sex-segregated college against an equal protection challenge. (We have already noted our reservations about the Court's disposition of that case; see text accompanying notes 162-65 supra.) Since no opinion was handed down in *Williams*, however, there is no way to discover the basis for the Court's conclusion that no constitutional violation had been demonstrated.

The Court obviously has not foreclosed the possibility that some forms of sex discrimination can violate the guarantee of equal protection, however, as evidenced by its agreement to hear at least three cases in which this issue is directly presented: *Reed v. Reed*, 93 Idaho 511, 465 P.2d 635 (1970), prob. juris. noted, 461 U.S. 934 (1971), discussed in the text accompanying notes 57-63 supra; *In re Stanley*, 45 Ill.2d 132, 256 N.E.2d 814 (1970), cert. granted sub nom. *Stanley v. Illinois*, 400 U.S. 1020 (1971), involving alleged discrimination against the male parent in awarding custody of illegitimate children; and *State v. Alexander*, 255 La. 941, 233 So.2d 891 (1970), cert. granted sub nom. *Alexander v. Louisiana*, 401 U.S. 936 (1971), involving a claim that females were systematically excluded from the grand jury which returned a rape indictment against the defendant, a male Negro. (The state court's opinion in the *Alexander* case indicates that race discrimination was the principal ground of defendant's motion to quash the indictment, however.) The decisions in these three cases are expected to reveal the attitudes of the current members of the Court toward equal protection as it applies to sex discrimination.

It must be acknowledged, however, that several recent Supreme Court decisions have appeared to restrict, rather than enlarge, the scope of the equal protection clause. In *James v. Valtierra*, 402 U.S. 137 (1971), the Court upheld a provision of the California constitution prohibiting construction of any low rent housing project unless it had received prior approval in a local referendum. Petitioners had contended that this special obstacle to the provision of low income housing discriminated against the poor, violating their right to equal protection. In *Hunter*

III

SEX AND RACE

In nearly every section of this study, we have advanced the analogy of racial discrimination in order to clarify and strengthen our arguments that various forms of sex discrimination constitute a denial of equal protection. Although we elected to postpone discussion of the general aptness of the analogy between race and sex, we are of course aware that the reader may not be ready to concede the validity of any argument based primarily on such an analogy. We are convinced, however, that each example we have suggested is appropriate and that all of them can be justified by the same general considerations.

Analytically, state-enforced sex discrimination is virtually identical to racial discrimination in at least three significant ways: (1) each reflects a group stereotype based on imputed characteristics which, if not purely imaginary, are nonetheless inapplicable to many individual members of the group; (2) each provides governmental endorsement for the opinion privately held by members of a dominant group that, due to the supposed

v. Erickson, 393 U.S. 385 (1969), the Court had earlier held invalid a similar law requiring a referendum as a prerequisite to the passage of any "fair housing" ordinance designed to prohibit racial discrimination. Mr. Justice Black (the sole dissenter in *Hunter*) wrote the Court's opinion in *James*; four justices joined him in refusing to extend the *Hunter* holding to invalidate discrimination which was apparently directed only against persons of low income, without regard to race. (Justices Marshall, Brennan, and Blackmun dissented; Justice Douglas did not participate.)

In *Levy v. Louisiana*, 391 U.S. 68 (1968) and *Glonn v. American Guarantee and Liability Insurance Co.*, 391 U.S. 73 (1968) the Court (dividing 6-3) declared discriminatory treatment of illegitimates in a state's Wrongful Death Act to be a violation of equal protection. After Chief Justice Warren and Justice Fortas had been replaced by Chief Justice Burger and Justice Blackmun, however, a new 5-4 majority reached a different conclusion in *Labine v. Vincent*, 401 U.S. 532 (1971), involving an illegitimate's right to inherit from his natural father. Mr. Justice Black, again writing the majority opinion, attempted in *Labine* to distinguish *Levy* and *Glonn*; *Labine* nevertheless casts great doubt on the validity of the proposition—which arguably had been established in *Levy* and *Glonn*—that illegitimacy constitutes a "suspect classification" for purposes of equal protection.

These decisions indicate that the Court is sharply divided over the scope of the equal protection clause, and specifically over the question of what (if any) application it may have outside the area of race discrimination. In this regard, see also *Oregon v. Mitchell*, 400 U.S. 112 (1970), especially the discussion at 126-31 (Mr. Justice Black's opinion, seemingly arguing that the fourteenth amendment applies only to racial discrimination) and 150-52 (appendix to the opinion of Mr. Justice Douglas, listing cases said to have struck down, on equal protection grounds, statutes discriminating on bases other than race). The only prediction that the authors feel safe in making about the three currently pending cases is that the decisions are not likely to be unanimous, and are even less likely to be embodied in a single opinion.

existence of these characteristics, each member of the subordinate group is inherently inferior; and (3) proceeding from the assumption that the stereotypes are accurate, each attempts to confirm and perpetuate the existence of the supposed characteristics by requiring every citizen to conform to a variety of rules, all of which reflect the belief that one group is in fact inferior to another.

The falsity of certain racial stereotypes, notably with respect to blacks and American Indians, has become widely recognized in recent years. That the female stereotype is also untrue (and even a bit foolish) has been convincingly argued by many, but the myth of female inferiority stubbornly persists—even among supposedly enlightened judges. The preceding sections document the consistency with which our (overwhelmingly male) judiciary has supported enactments of our (predominately male) state legislatures that require women to conform to the expectations of the dominant group. In addition, the case law clearly shows that women have been denied equal treatment in employment, public education, places of public accommodation and—shamefully—in those supposed bastions of “equal justice,” the criminal and civil courts. In all of these respects, contemporary sex discrimination closely resembles the pre-*Brown* pattern of racial discrimination by law.

As bases for classification, sex and race share three important similarities: (1) by and large, members of the subordinate group are readily identifiable; (2) membership in the “inferior” group is initially nonvolitional; and (3) once acquired, this membership cannot be renounced. (Particularly in the last respect, race and sex discrimination are of a different order from discrimination against the poor or the young; members of these latter groups are not inevitably trapped for life in a subordinate status.) It is repugnant to the most rudimentary sense of fairness that a person should be officially relegated to an inferior status, severely limiting his opportunities for self-expression and achievement, solely because of an accident of birth. Stripped to its essentials, this is precisely the effect of racial and sex discrimination.

Belatedly, whites are starting to comprehend the enormity of the injustice perpetrated upon nonwhites in America. White males, on the other hand, have hardly begun to recognize that the society we control has visited exactly the same type of injustice upon nonmales—though admittedly with less heinous consequences. Notwithstanding the fact that a far greater degree

of visible harm has been suffered by nonwhites than by females, a general pattern of economic and political disadvantage is easily demonstrable in both cases.

In terms of other, less obvious effects upon individual members of the subordinate group, sex and race discrimination are again distressingly similar. When it enforces either kind of discrimination with a broad range of sanctions, the state encourages its citizens to relate to each other according to group stereotypes, rather than as individuals. This is dehumanizing—for the dominant group as well as the subordinate. But the effect on the “inferior” individuals is particularly unfortunate: constant subjection to pervasive reinforcement of group stereotypes tends to influence—to *distort*—their perception of themselves. As one recent commentator put it:

Lowered cultural expectations of success and higher expectations of failure result in a self-fulfilling prophecy: From those of whom little is expected little is achieved. These patterns of discouragement, the perpetuation in our education processes of women as “helpmate,” the absence of “appropriateness,” all these handicaps to women in our society are key factors in a woman’s choosing to be a nurse rather than a doctor, a law secretary rather than a lawyer, a researcher rather than a writer, a teacher rather than a practitioner.²⁰⁷

At best, these effects of racial and sex discrimination are wasteful of invaluable human resources; at worst, they are damaging and degrading to the individuals affected.

In light of all these similarities between the operation and effects of both types of state-imposed discrimination in education, employment and the judicial process, we believe it entirely appropriate to use racial analogies to assist in the resolution of cases involving the rights of women. Indeed, we would contend that, at least with respect to the areas surveyed above, both types of discrimination should be subjected to the identical equal protection standard.

True, there may be areas of state regulation where the analogy between sex and race should not be employed—where certain types of sex discrimination should be recognized as valid although corresponding racial discrimination would not be. Several areas of law not discussed above quite explicitly distinguish between the sexes, and often operate upon them unequally. One obvious example is the regulation of sexual activity by criminal statutes that punish one sex exclusively or more severely than

²⁰⁷ Sassower, *supra* note 13, at 330.

the other; another is the regulation of family relationships by statutes—such as those relating to marriage and divorce, abortion and sterilization, child custody and support, etc.—that in many ways define the rights and duties of the marital partners differently according to their sex. There are those who feel that all laws governing sexual conduct and familial relationships are in need of drastic overhauling, so as to make them completely neutral between the sexes. On the other hand, many would argue that there are basic societal interests in these areas which might be threatened by such a readjustment.

One need not hold any particular opinion about society's regulation of sexual activity and marriage, however, in order to respond to the issues of equal protection arising in education, employment, and the judicial process. On the contrary, the argument for sex equality in these areas is made even more compelling by the fact that the sexual discriminations there involved have *nothing whatever to do with sexual activity or inherent sex differences*. This is not to deny that equal protection issues may be raised by laws regulating sexual conduct or familial relationships; it is simply to suggest that such issues should be all the more visible in the many cases where sex differences or sexual activity are *not* directly involved.

IV

JUDICIAL ATTITUDES TOWARD SEX DISCRIMINATION CASES

Despite the strong argument that sex discrimination has much the same destructive potential as race discrimination, it is nevertheless undeniable that American judges have responded more readily to claims of injury from the latter. It is possible, of course, that this merely establishes that sex discrimination is not inherently harmful—thereby disproving our thesis. It is also possible, however, that there are reasons why male American judges should have difficulty in perceiving its harmful effects. We should like to offer our intuitive suggestions as to what some of these reasons may be. We believe that what follows is to a great extent applicable to all males, although our primary concern is with the extent to which it may be true of judges in particular.

The failure of any male to perceive the harmful potential of various sexually discriminatory laws and practices can perhaps be initially ascribed simply to a lack of knowledge. This is particularly true in contrast with race discrimination. For at least the past ten years, the white public has been exposed to a

rather steady and wide-ranging stream of information about the effects of one hundred years of segregation and discrimination on the black citizens of America. Only recently, however, has the public begun to be aware of the injurious effects of sex discrimination. It is the responsibility of counsel, of course, to educate the judge about the facts of any lawsuit, and in a case involving sex discrimination, this includes helping him to understand in what respects the practice complained of is harmful to those affected.

Like most other men, male judges suffer from an additional handicap in comprehending the effects of sex discrimination. With respect to race, it is likely that the white judge has close personal association with few if any black persons; although his information about the harms of race discrimination may therefore be secondhand, it nevertheless may have considerable validity for the black population in general. Virtually every judge, however, is in daily contact with one or more women on a close personal basis—a wife, a daughter, a mother, a sister, or one or more office employees. If the women with whom he is associated are all apparently happy and satisfied, he is likely to conclude from this that all “sensible” women are content with their lot. In this respect, judges—like the authors of law review articles—must be alert to the dangers in overgeneralizing from their personal experience.

Even assuming that a judge does understand the effects of sex discrimination, he may nevertheless be deterred from granting relief in a particular case because of personal attitudes of which he is not even aware. There are a number of emotional responses to “women’s liberation” which it seems to us are shared by many men, including some judges. One of these, the fear of competition from individual women, is probably not present in the judge’s case; judges, by and large, hold positions where women are no particular danger to either job retention or possible promotion. This may of course change in another generation, as the proportion of female law graduates rapidly increases, but for the present generation of judges, women probably pose little or no threat of personal competition.

In a more abstract way, however, competition from women as a group may indeed seem to threaten the judge’s interests. Most judges hold their offices at least in part because of past activity in a political organization under predominately masculine control. Although there are of course able and successful female practitioners of the art of politics, they remain exceptions

proving the rule that politics, like most exercises of power, is still a "man's game." Any change in the respective roles of the sexes which militates against such masculine domination—even if only in an insubstantial, largely symbolic way (as for example the question of whether women should serve on juries)—may stir uneasiness in the heart of one amply rewarded by, and comfortable with, the political status quo.

Fear of economic or political competition, even if wholly subconscious, is of course an obvious reason why one might be moved to support discriminatory practices. There are, however, other emotions which may influence any male judge's response to a suit involving sex discrimination. All lawyers know that the "law" as represented by the results of litigated cases is as much the product of the court's evaluation of the "morality" of the parties' behavior and the "fairness" of the possible decisions as it is of any set of abstract rules. One way in which a good judge will utilize his emotional responses in partnership with his intellect is by engaging in a process of *empathy*—attempting to perceive the case before him as it is viewed *by the parties themselves*. Olympian detachment is indeed the best posture from which to render final decision, but it should be assumed only after the judge has first exercised his ability to empathize with the parties to the lawsuit.

Faced with a black man's complaint of racial discrimination, a white judge may well do at least a passable job of empathizing with the plaintiff—of temporarily imagining himself to be black-skinned. This will of course vary with the judge's own conditioning on the matter of race. For a judge taught from birth to regard every black person as a subhuman creature, empathizing with a black man is as inconceivable as empathizing with an eagle or a Labrador retriever. The judge not so severely handicapped, however, will be able to imagine how it would feel to be on the receiving end of such discriminatory treatment. From this perspective, the judge's answer to the hypothetical question "How would I feel if someone did that to me?" is likely to be "Furious!"—because if there is *anyone* unaccustomed to being treated as inferior or subordinate, it is a white male American judge. Having subjected himself, even if fleetingly, to what he imagines to be the plaintiff's mental tribulations, the judge is better equipped to test the parties' competing claims against an abstract principle of law.

Where sex discrimination is alleged, however, most male judges are likely to have considerable difficulty empathizing with

a female complainant. Even before the typical American child first becomes aware of sex differences, he (or she) is conditioned to conform to the social role expected of his sex—which interests he should pursue (and which to shun), which occupations he should consider (and which to ignore), how he should talk, walk, think and *feel*. And one of the very worst things he can do, in society's eyes, is to express a desire to be—or to behave as though he were—a member of the other sex. Although there is some evidence that preoccupation with secondary sex differences may be declining, for the present generation of judges it may be easier to assume the imagined mental state of a black male, of whatever station in life, than it is successfully to imagine that one is a *female* (even a white, middle-class one). The wonder is not that some judges display insensitivity toward the sexist features of our society but rather that an increasing number of judges are apparently able to break through the strictures of their own conditioning.

An even more deeply rooted emotion which judges share with most of mankind is a general hostility to change—especially change of such a fundamental and far-reaching character as to transform radically the basic institutions of society. Although complaints about sex discrimination may focus on particular practices, the whole battery of “women's liberation” goals seems to some (both men and women) to portend a future society in which the roles of men and women as members of a family unit would be so different from those of today as to make it almost unrecognizable. Perhaps children would not be raised by their parents at all; perhaps marriage as we know it would disappear completely; perhaps the concept of “family” would mean something completely different—or nothing at all. To many white southerners of twenty years ago, the end of racial segregation seemed to spell the end of civilization. For the elderly or even middle-aged person today, any prospect of a basic change in the family structure of society as he has known it may seem equally disquieting. Even the most modest demand for equality, if perceived as the spearhead of a wide-ranging assault on the social order, may thus be viewed as a threat. But the reconciliation of stability and change is the essence of the judicial function; judges are therefore required to transcend their natural aversion to change—to join in shaping the course of social evolution, rather than adamantly opposing it.

If the above analysis has any validity, it follows that male

judges are likely to decide issues of sex discrimination from a narrow perspective and under certain psychological handicaps. Are any countermeasures available to them?

First, the judge can avoid the temptation to dismiss summarily any claim of impermissible sex discrimination as "lacking in substance." The fact that a particular statute or practice has received general acquiescence for many years from both males and females should not foreclose judicial consideration of its constitutionality. (Here again, race discrimination furnishes an instructive parallel.)

The next suggestion is implicit in what has been said earlier about the process of judicial empathy. The judge must make a conscious effort to educate himself as to the effect of the statute or practice in question, from the point of view of the different types of women it affects. If the statute is one which prohibits all women from engaging in a certain occupation, for instance, he cannot be content with merely considering whether he, a mature male, is inclined to think that women generally ought not to engage in the proscribed activity (much less whether he thinks his own wife or daughter should do so). Rather, he must consider how a variety of women—single women as well as married, older women as well as young, black women and white, those with much education and those with little, those with children and those with none—are affected.

Further questions should be explored: Do the reasons advanced to support the discrimination in question apply only to *some* women? To some *men*, as well? Does it represent an expression of the stereotype of woman as a homebody, fit only for domestic labor? Or as some sort of harlot, wantonly corrupting innocent men? Does it appear to represent a conclusion that some portion of the community's affairs are—and should continue to be—run completely or primarily by men? That some kinds of decisions are better left to men? If the answer to some of these questions is yes, we would suggest that a *prima facie* case has been made against the validity of the statute or practice in question, as a denial of equal protection.

If the judge has reached this conclusion, then the next question is whether there is a basis for the legislature's action sufficient to overcome the initial finding that improper class legislation may be involved. We have earlier suggested that a classification based on sex is one which demands "scrutiny" as "strict" as any other, including race. If the reader disagrees, he

will probably concede that there must at least be a "rational basis" for the discrimination. How does the judge ascertain whether such a "rational basis" exists?

It is perhaps more appropriate to suggest what the judge should *not* do in this regard. One suggestion would be to avoid merely concluding (as some judges apparently do) that the legislature must have had *some* reason, and whatever it was, it is good enough. Certainly a presumption of validity attaches to any legislative act, but when that presumption has been overcome by a showing of unequal treatment, it should be incumbent on the proponent of the act to demonstrate what its purpose was and why that purpose justifies treating the sexes in an unequal manner.

A second response to avoid is acquiescence in discrimination merely on the ground that it may obviate some degree of expense or inconvenience. An easy example is the jury statute considered in the *Hoyt* case, which was supported by the argument that calling only female volunteers would avoid the inconvenience occasioned by calling women who would then claim exemption. Another might be the claim of an educational institution that requiring it to admit females would entail the burden of providing them with restroom and other facilities not currently available. In our view, a state's policy of discrimination is not justifiable merely because it is more convenient or less expensive than a nondiscriminatory policy. It would be cheaper and more convenient to choose our President only from the citizens of one particular state, to have only citizens of that state elect him and to elect a new one only when the incumbent dies or retires. It would also be cheaper and quicker to do away with trial by jury in criminal cases. There are competing interests in both cases, however, which are stronger than the mere desire for efficiency and economy. The policy against sex discrimination should also be strong enough to prevail in such a competition. While efficiency and economy are in general "rational bases" for legislation, they do not justify discrimination against individuals on the basis of inborn characteristics which they are powerless to alter.

V

CONCLUSION

Having presented the results of our legal research, as well as our own intuitive hypotheses about judicial attitudes in sex discrimination cases, we would add only one item to a presentation perhaps already overlong. Freely conceding as we do that

male judges are not unique in manifesting sexist habits of thought but rather share them with most other males (even law professors, ourselves included), have we any justification for singling out the judiciary for special criticism?

The judge in American society occupies a position of unique esteem in the eyes of his fellow citizens. In return for this particular honor, the judge assumes a special burden of personal responsibility for the fairness, objectivity and disinterestedness of his approach to the legal issues presented to him for resolution. This duty requires him, insofar as he is humanly able, to perform his judicial functions without yielding to the many prejudices and superstitions that influence other men in every aspect of their daily lives. Just as the policeman's special role entitles society to expect him not to react violently to taunts or expletives that would incite most men to action, so the judge can fairly be expected to free himself as nearly as possible from the limitations of his personal attitudes about sex roles in cases involving constitutional challenges to sex discrimination. The judicial role must transcend social conditioning in such matters; in this respect, the judge must be *above* other men.

Another aspect of the judicial role is the responsibility to be *ahead* of other men. Judges are not entitled to the luxury of shielding themselves behind public opinion or community attitudes, however strongly held those may be. The judiciary thus cannot shift responsibility to the legislatures, the press, women's liberation activists or anyone else. Nor can it postpone affirmative action until public opinion is overwhelmingly convinced that the time is appropriate. A judge whose opinions on important questions of public policy reflect nothing more than his private estimate of public majority opinion is engaging in journalism, not jurisprudence.

Our study has convinced us that, to date, most male American judges faced with issues of sex discrimination have not adequately met these special responsibilities. There are, however, some encouraging signs of progress. It is our hope that this study will contribute to an increasing judicial understanding of and sensitivity toward the serious constitutional issues raised by state laws that discriminate against individuals solely on the basis of their sex.